AN INQUIRY

INTO

THE ORIGIN OF THE OFFICE AND TITLE

OF THE

JUSTICE OF THE PEACE,

WITH

AN APPENDIX,

ON SOME OF THE DEFECTS OF OUR ANCIENT STATUTE BOOK,

&c. &c. &c.

But the mortallest enemy unto knowledge, and that which hath done the greatest execution upon truth, hath been a peremptory adhesion unto authority, and more especially the establishing of our belief upon the dictates of antiquity.—*Sir T. Brown's Works.*

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INTRODUCTION.

THE following pages form part of a small work, now nearly ready for the press, upon the subject of a remarkable case "of binding over to the good behaviour," to which I strongly objected at the time; but the publication of that work is suspended for a while from motives of delicacy towards some gentlemen particularly interested in that case, and also for the purpose of preventing the application of any thing I may have written to a purpose foreign to my original intention. The present publication, though it formed an essential part of that intended work, yet is complete in itself, and may be read as a separate treatise under the title here given to it, namely, AN INQUIRY INTO THE ORIGIN OF THE OFFICE AND TITLE OF THE JUSTICE OF THE PEACE. NOW, as the remarkable case "of binding over to the good behaviour" was based upon an authority said to be given to justices of the peace

by the 34 Ed. 3, c. 1, of taking sureties for the good behaviour under circumstances similar to and of the same nature as those comprehended in this case; and as it occurred to me that this statute gave no such authority to county magistrates, I opened the first volume of the Statutes at Large for the purpose of making myself more intimately acquainted with this statute than the brief quotation made from it in Burn's Justice of the Peace would allow;[1] and thus in turning over the curious and extraordinary pages of that volume of our antiquated statutes, the important subject of this present publication was suggested to my mind.

Few in number as are the following pages, yet they have cost me great labour and occupied all the time that the due performance of those duties required at my hands, as a member of society, would allow me to spare during the last twelve months; and because it has very frequently happened that I have been unable to pen a single line, or refer to

[1] Vol. 5, p. 909. Edit. 1837.

a single work for information, during very many consecutive days, and even for some weeks together, I have great reason to fear my present work will wear a bald appearance, and exhibit such a want of continuity as to render it abrupt and even obscure in many places. To attempt a polished style by much blotting and scratching is with me impossible, as I have not the time, and must economise my midnight oil. All, therefore, that I have endeavoured to obtain, is, such a perspicuity of expression as will render my meaning sufficiently clear to an ordinary reader; though I would rather submit to the labour of copying out these pages as often as Demosthenes is said to have copied out the history of Thucydides, than that any grossly defective sentences should disgrace this humble performance: but until this book had actually gone through the press no opportunity presented itself for reading it through as a whole.

I affect not to treat of points of law; this inquiry relates to mere matter of history; yet is my subject beset with difficulties. And

great as are those difficulties they are increased a thousand fold by this untoward circumstance—that all the great and lesser law authorities of antiquity or modern times are decidedly against me. So heavily has this circumstance pressed on my mind that I have many a time and oft well nigh given up the prosecution of this inquiry. I have often thought it impossible that men of such vast and general celebrity as Fitzherbert, Lambard, Lord Coke, Dalton, Hawkins, &c. &c., could be wrong, and that the error arose entirely from my total inability to read and understand those things touching english history, legislation, and english jurisprudence, that were yet familiar to me and intelligible enough in history, legislation, and jurisprudence generally. And thus doubting even the evidence of my own senses, I have frequently been forced into a long, laborious, and unnecessary research amongst the writers of the olden time. I have, however, carried my inquiries far enough to discover the true source of this discrepancy between the historical relations of those great departed spirits and that of my own humble

sketch, and to produce a satisfactory solution of the uniform and constantly recurring histories of the origin of the Justice of the Peace in all the law books written expressly for "the great unpaid." The solution is found in this simple fact—namely, that the little historian of the day has slavishly, and without examining for himself, copied the relation of the great historian of yesterday. Satisfactory as this solution appears to me, it by no means follows that my readers will experience an equal degree of satisfaction. And I am as far from putting this solution forward as a proof of the correctness of my own history, as I am far from admitting that, because a fact has been related in the same way by all the law writers during three hundred years, it must necessarily be true.

After all, whether the history here given of the origin of the office and title of the Justice of the Peace be more correct and certain than that hitherto given by law writers; whether that officer originated in the 23 Ed. 3, or formerly existed under the title of the keepers of the peace, must depend

upon the evidence which the records of our country can produce. On the part of the old historical accounts we find nothing but assertion without proof; for the account which I here venture to put forth there is the most plain and simple evidence in the statutes of the realm, supported by a vast mass of ancient history.

Let it be borne in mind that my object is not to trace to its origin the first institution of such a minister of justice as the Justice of the Peace of modern times, for then, indeed, my task must have commenced precisely where it may be now supposed to end, namely, by considering the laws and jurisprudence of the Longobardi, and then to continue my inquiry into far distant countries. For such an investigation I am not prepared, being most unfortunately unacquainted with the leading languages of the East—the Sanscrit and the Arabic. But judging from the translations and the works of others, we shall determine pretty correctly when we affirm that the first principles of law and justice and jurisprudence

of Europe have, like almost all European languages, an eastern origin.[1] This present inquiry is limited to the origin of the office and title of the Justice of the Peace in England.

THE FIRST SECTION of this book is devoted to an examination of those statutes of the realm in the 13th and 14th centuries, generally cited by law writers as showing the origin of the Justice of the Peace in those ministers formerly called "keepers of the peace." But whether the inferences that I

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[1] The curious reader may consult with advantage the Jewish, Hindoo, and Chinese codes of laws, and on a single reading he will be surprised by the many striking and extraordinary points of coincidence between them and the earliest Saxon laws, as well as our own of early date; and, perhaps, in no one instance more remarkable than the system of internal police of the Chinese in the division of the towns and country into *tithings* and *hundreds*, and making the householder (the *hus-bond* of the Saxons) responsible for the conduct of his family. This was also the system of the Saxons and Angles long before their migration into England. (Hist. de la conquête de l'angleterre par les Normands. Par Augustin Thierry, tom. i. p. 133.) And is it too much to suppose that many laws and customs were carried along by those mighty currents of migrating beings who poured in from the East, and ultimately produced and spread over Europe the whole Indo-Germanic family of languages? (See Donaldson's New Cretylus, bk. 1, c. 4.)

There is an admirable work by B. H. Hodgson, Esq. British re-

have drawn from these statutes be more correct than those of the old historians, the reader alone must judge.

THE SECOND SECTION treats of those statutes in which the origin of the office and title of the Justice of the Peace may undoubtedly be found; and a hasty sketch is given of the progress of the newly-formed justices in the acquirement of power and influence in the country during the first century after their creation, that is, from the 23 Ed. 3, an. 1349, to 39 H. 6, an. 1460.

THE THIRD AND LAST SECTION completes the inquiry by treating of the several titles

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sident at Nipál, "On the Administration of Justice in Nipál, with some account of the several courts, extent of their jurisdiction, and modes of procedure," that will amply repay the reader's time and trouble, and impress upon his mind the conviction of the vast antiquity of courts of law and formal judicial proceedings, as well as of the eastern origin of European jurisprudence. He will there find the institution of the trial of ordeal; extortion of confession; voluntary confession admitted; the substitution of oaths for evidence; the power of the courts to reconcile parties, and to refer to arbitration, &c. &c., all having formerly existed in Europe, and some still remaining.

See also G. Brassy Halhed's Gentoo Code, Staunton's Chinese Code, &c.

of justices, keepers of the peace, wardens of the peace, seneschals and bailiffs, &c.: and by bringing the histories and opinions of learned writers to bear upon the leading facts of those important ordinances of the monarch and enactments of the parliament I have relied upon, by which the truth of the history, and the inferences here drawn from the evidence of the statute book, are strengthened and fully established.

THE APPENDIX is principally occupied by a consideration of the extraordinary state of our statute book, with reference to the old statutes of the 13th and 14th centuries more particularly. I have not travelled out of my way in order to point out the great and serious defects so conspicuous upon every page of our ancient laws, for it will be seen that my observations are confined to those statutes which were necessarily consulted in the course of this inquiry. I have, however, indulged in some reflections that may not be considered as strictly in place; but though they may be out of place, I trust they will not be found of such a

character as to put any of my readers out of humour, nothing being more distant from my thoughts, object, or intentions, than that of pointing my finger contemptuously at any individual, or order, or class of men.

I might, indeed, have written much more, both as regards the subjects already touched upon through these pages, as also with regard to the number of curious and interesting objects that constantly presented themselves at every turn to my searching view. But I have forborne, that, on the one hand, I might not write a ponderous volume suited alone to the taste of the very few; and, on the other hand, because I found I could not devote sufficient time in the investigation of any one subject in order to produce a result that would be satisfactory even in my own estimation. Had I indulged my desires in this particular, I should have written a book that might have been entitled *De omnibus rebus cum multis aliis*, and the longest life would have been too short for its completion.

A SECOND PART TO THE APPENDIX has

been added, consisting of a paper upon certain statutes and definitions of "Barretry" and "Champerty." The principal object designed to be accomplished by the addition of these two papers is to give further illustrations of the erroneous and defective translations of our ancient statutes, on other subjects than those immediately concerned in this inquiry.

But the learned commissioners now engaged in inquiring into our criminal law, and into the law of real property, will, I hope, terminate their important labours in bringing about a total revision of our ancient laws, and a complete correction and amendment of our defective statute book.

And it would be a great happiness for the whole nation if a commission were to issue for the purpose of inquiring into the powers and jurisdiction of the Justice of the Peace, with a view to the placing of that important minister of justice upon a more defined and enlightened foundation. For it is beyond all dispute that the Justice of the Peace has no power in many matters in which he could act with the greatest advantage to the

public; that he now has the least powers wherein he ought to have the greatest; and that he has the greatest powers in those matters wherein he ought to have none at all.[1]

[1] I allude to his vast and inordinate powers in matters of appeal; in trying offences by a jury; and in being enabled to punish offenders by transportation for the term of their natural lives without appeal. Such a commission would then discover that the 34 Ed. 3, c. 1, gave no powers to Justices of the Peace.

AN INQUIRY

INTO THE

ORIGIN OF THE OFFICE AND TITLE

OF THE

Justice of the Peace.

Section I.

AN EXAMINATION OF THOSE STATUTES OF THE REALM, IN THE THIRTEENTH AND FOURTEENTH CENTURIES, GENERALLY REFERRED TO AS SHOWING THE ORIGIN OF THE JUSTICE OF THE PEACE.

The 1 Ed. 3, s. 2, c. 16, is the first statute referred to, in law books, appertaining to the creation of justices of the peace, it is found under the imposing title, "Who shall be assigned Justices and Keepers of the Peace;" but strange to say, though not more strange than true, there is not one word either of justices or keepers in the chapter, which is in the following words;[1] "Item, for the better keeping and maintenance of the peace, the King will, that in every county good men and lawful, which be no maintainers of evil,

[1] In almost every instance where reference to any statute is made, the whole of it, or the essential passage, is given in this book, to obviate the necessity of referring to a copy of the statutes at large.

or barrators in the country, shall be assigned to keep the peace."[1]

Now there is nothing in this chapter that can be said to relate to justices of the peace or to justices of any kind; and it may with greater probability be inferred that constables which were also called, according to law writers, conservators and keepers of the peace, were more particularly alluded to in this statute. And in support of this opinion the 2 Ed. 3, c. 3, may be cited, in which justices and magistrates, &c., are mentioned, but the Justice of the Peace is not named, as follows; "and that the King's justices in their presence, sheriffs, and other ministers in their bailiwicks, lords of franchises, and their bailiffs in the same, and mayors and bailiffs of cities and boroughs, within the same cities and boroughs, borough-holders, constables, and *wardens of the peace* within their wards shall have power to execute this act."[2] Is it not therefore reasonable to suppose that if justices of the peace, or keepers with the like powers of justices, had existed at that time, they would have been named

[1] In the Appendix some observations will be found touching the error committed in translating the expression "*a la garde de la pees*," by the phrase "to keep the peace."

[2] This act relates to breaches of the peace by persons going or riding about armed: and why was the original phrase "*gardeins de la pees*" not translated "keepers of the peace" in this instance?

in proper order according to their rank and jurisdiction? It is a forced construction to call the keepers of the peace in those days by the title of justices, when we find them classed with constables and wardens amongst the last of the civil powers. And in the 27 Ed. 3, s. 2, c. 21, it is enacted that "the mayor and constables have power to keep the peace";[1] thus constables may be termed keepers of the peace as well as a mayor, but the jurisdiction of a Justice of the Peace has always been of greater extent and importance than that of a mayor or other municipal magistrate. Here an observation may be thrown in, by the way, upon the singularly illogical statements made by a celebrated writer of the present day,[2] they are as follows: "the commission of the peace, under which the magistrates of a county derive their powers, dates within the period of legal memory. In early times there were persons of weight and substance in each county, who were called conservators[3] of the peace; *but the au-*

[1] The words in the original are, "et qe lez ditz mair et conestables eient poair de garder la pees."

[2] Dickenson's Quarter Sessions, by Talfourd, p. 2.

[3] Constables are conservators of the peace according to *Hawkins*, as quoted in Burn's Justice, vol. i, pp. 271 and 835. And *Lord Coke's* opinion of the origin of the constable is disputed by Hawkins. *Ibid.* 827.

thority they enjoyed is unknown, and unquestionably they had no court of record in which they could act as judges. By 1 Ed. 3, s. 2, c. 16, intituled, 'who shall be assigned justices and keepers of the peace!' it was directed that 'in every county, good men and lawful, which be no maintainers of evil quarrels in the country, shall be assigned to keep the peace;' but in what *manner* they were to maintain order, *and how* they were to execute the authority thus conferred, *does not appear, though doubtless* they were to take *such measures* for that object as *the old conservators used.*"

Now, if the authority of the old conservators be unknown, how does the learned writer get at the fact, that the keepers of the peace were *doubtless* to take such measures as the old conservators used? Though in the same sentence we are informed, that the manner they (the keepers) were to maintain order and how they were to execute their authority, *does not appear!* How can the measures of two powers be taken or compared when both powers are equally unknown? The whole of the confusion evident in the assertions and opinions of law writers touching justices, conservators, and keepers of the peace, and war-

dens and constables, arises out of our defective statute book, wherein the language of the original statutes is crowded with the most palpable errors of the transcribers, and the translations are for the most part ludicrously absurd. But to proceed with the examination of the statutes.

The next statute generally cited upon this subject is the 2 Ed. 3, c. 6, which, by referring to the Statute of *Winchester*, is of considerable importance, since there is little reason to doubt but that reliance has been placed upon these statutes for the opinion of some historians[1] that justices of the peace were instituted by Edward the First. This chapter is placed in Ruffhead's edition, under the fallacious title, "Justices shall have authority to punish breakers of the peace." Now this title might have escaped censure, if the often repeated marginal references had not shown that the justices here named meant justices of the peace, and it will be found, that had the author of this title written, "Justices shall have authority to punish breakers of the sea," he would not have been less accurate in the designation. The

[1] See Gen. Hist. of Eng., by Thos. Corte, an Englishman, vol. ii, p. 203, edit. 1750. Also Hume's Hist. of Eng., vol. ii, p. 567, and others.

words of this chapter in the given translation are as follows; "Item, *as to the keeping of the peace*[1] in time to come, it is ordained and enacted, That the statutes made in time past, with the Statute of *Winchester*, that the justices assigned shall have power to inquire of defaults, and to report to the King in his parliament, [and the King to remedy it[2]] *which no man hath yet seen*,[3] the same justices shall have power to punish the disobeyers and resisters."

Before however any observations can be made with intelligence upon this chapter, which, but for its mention of the old statute is of little moment; the Statute of *Winchester* must be brought before the reader both in its original French and in its English dress. Not only on account of its importance, but because it would be idle and vain to suppose any one, not duly initiated into the mysteries of the law, so credulous as to believe a statement that would accuse "my wise masters learned in the law"[4] of forming their grave

[1] This is a new version of the original words, which are, "*et quant a la garde de la pees.*"

[2] The words included in the brackets are not in the original,—note in Ruffhead's edit.

[3] The original of the words printed in italics is as follows, "dont home nad pas veu issue."

[4] An expression of Lord Lyttleton in the Epilogue at the end of Sir Ed. Coke's 1st Institute.

opinions upon statutes which, in their original language, are thickly studded with errors, and in their translation present, as in this chapter of the Statute of *Winchester*, a mass of incomprehensible nonsense.[1]

As the whole of this chapter will be found in the Appendix, only that particular part which is essential to my present argument is given in this section. The particular passage in this Statute of *Winchester*, 13 Ed. 1, s. 2, c. 6, is as follows; "E qe veuc es armes seit fete deus foiz par an. E en chescun hundred e franchise seyent eleus deus conestables a fere la veu des armes e les conestables avauntdiz presentent devaunt les justices assignez *quant il vendrunt en pays* les de fautez qil averount trovez de armere e de suites de veilles e de cheminz."

These incorrect sentences are still more incorrectly given in the English version; thus, "And that View of Armor be made Every Year Two Times. And in every Hundred and Franchise Two Constables shall be chosen to make the View of Armor: And the Constables aforesaid shall present before Justices assigned such defects *as they do*

[1] A particular notice of some of the most prominent errors committed in the translation, &c., of this statute, will be found in the Appendix.

see in the country about Armor, and of the Suits of Towns and Highways."

A single reading is sufficient to show the great defects of this translation, the principal and most important being in the omission of any notice of those words printed in italics in the original, and the substitution of the words printed in italics in the translation, by which the plain and simple expression of the original has been entirely lost sight of, and perverted to an unmeaning jargon. The effects of the omission of these important words, designating the character and description of the justices, have been singularly embarrassing, and productive of great error. But if the English translation be made according to the plain and obvious meaning of the original, the concluding words will run thus, "and that the constables aforesaid present before the justices assigned, *when they shall come into the country*, the defaults that they shall have found concerning armour," &c. Who are the justices that "come into the country" from time to time? It is hardly necessary to say they are the justices of eyre—of oyer and terminer—of gaol delivery—and of some special commission sent down into the country on momentous occasions. These, therefore, are the justices pointed out in the Statute of *Winchester*

by the expression "when they shall come into the country," (*quant il vendrunt en pays*), and not justices of the peace, as is inferred from the title and the marginal notes to the several statutes in connection with it. Thus the following words form a marginal note to this statute in Ruffhead's edition, against the term "justices assigned." "See 2 Ed. 3, c. 6, giving power to *justices of the peace* to punish disobeyers and resisters." And this mode of designating justices of eyre is illustrated by the 4 Ed. 1, s. 2, "et quotquot inventi fuerint, qui non sunt culpabiles, attachientur usque *ad adventum justiciariorum itenerantium*, et nomina eorum in rotulo scribuntur *coronatoris*." This passage is thus translated, "and such as be founden, and be not culpable, shall be attached until the coming of the justices, and their names shall be written in rolls." Here we find the word *itenerantium* is not translated, thus leaving out in this instance, as in the Statute of *Winchester*, the essential characteristic of the justices, showing them in both cases to be justices of eyre.[1] Now it is to these justices of eyre

[1] Another proof of the defective state of our statute book, is also shown in the second part of the phrase, by omitting the word *coronatoris* in the translation, so that the English reader knows not in what *rolls* the names are to be written, and iteneran-tium should be itinerantium.

that the 2 Ed. 3, c. 6, refers, by citing the Statute of *Winchester*. Thus we have a clear history that because the enactments of the ancient Statute of *Winchester* had not been kept, this statute of 2 Ed. 3, was passed to enforce the neglected regulations, and it is followed up in the next chapter (c. 7.) of this same statute of 2 Ed. 3, by a commission given in form to certain judges, as of old, for the trial of offenders, and though this commission extends to all ministers of justice, yet neither the Justice of the Peace nor the keepers of the peace are mentioned in the chapter;[1] a presumptive proof that such justices had no existence in those days.

As this Statute of *Winchester* is the only one referred to in the reign of Ed. 1, by writers both in law and history, in proof of the institution of the office of Justice of the Peace by that monarch;[2] and as the most careful examination of the statute book for that reign does not furnish

[1] This chapter is not translated in Ruffhead's, or any previous edition of the statutes.

[2] "Edward (the 1st) settled the jurisdiction of the several courts; *first established the office of Justice of the Peace*; abstained from the practice, too common before him, of interposing justice by mandates from the privy council." Hume's Hist. of Eng., vol. ii, p. 567. Hume gives no authority for this assertion relative to justices of the peace, but probably had his eye upon the Stat. of *Wynton*.

any other similar evidence, it may easily be supposed that the omissions and blunders of the translation of this statute have misled the cursory inquirer; and that others have merely been led by the opinions of previous writers, contenting themselves with the assertion of some grave authority instead of examining into the fact itself. And if Hume meant that this King abstained from issuing commissions or ordinances, when stating that he abstained from interposing justice by mandates from the privy council, then the statute book is the most direct evidence against the correctness of the historian, since it is well known that the greatest difference of opinion exists as to what statutes are to be taken as acts of parliament, and what are nothing more than ordinances of the King and his council during this reign.[1]

But to proceed to the next act generally referred to as relating to the powers of the justices of the peace, still under the appellation of keepers of the peace. Here also it will be found that these

[1] See note, Pref. p. 7, to Ruffhead's edit. of the stat. "Throughout the reign of Ed. 1, the assent of the commons is not once expressed in any of the enacting clauses; nor in the reigns ensuing, till the 9th of Ed. 3, nor in any of the enacting clauses of 16 R. 2. Nay, even so low as H. 6, from the beginning till the 8th year of his reign, the assent of the commons is not once expressed in any enacting clause."

keepers are invested with no other authority than that of constables, by the nature of those duties which this act enjoins them to perform. This act is the 4 Ed. 3, c. 2, and appears under the deceptive title of "The authority of Justices of Assise, Gaol delivery, and of the Peace," and is as follows :—

"Item, it is ordained, That good and discreet persons, other than of the places, if they may be found sufficient, shall be assigned in all the shires of England to take assises, juries, and certifications, and to deliver the gaols; and that the said justices shall take the assises, juries, and certifications, and deliver the gaols, at the least three times a year, and more often if need be. Also there shall be assigned good and lawful men in every county to keep the peace. And at the time of the assignments, mention shall be made that such as shall be *indicted or taken* by the said keepers[1] of the peace, shall not be let to mainprise by the sheriffs nor by none other *ministers*[2] if they be not mainpernable by the law, nor that as shall be indicted shall not be delivered but at the common law. And the justices assigned to

[1] Here the word "*gardeins*" is translated keepers, and not *wardens*, throughout this chapter.

[2] The word ministers is not in the original French.

deliver the gaols shall have power to deliver the *same*[1] gaols of those that shall be indicted before the keepers of the peace, and the said keepers shall send their indictments before the [*said*][2] justices, and they [*the said justices*] shall have power to inquire of the sheriffs, gaolers, and other in whose *ward*[3] such indicted persons shall be, if they make deliverance, or let to mainprise any so indicted, which be not mainpernable, and to punish the said sheriffs, gaolers and others if they do anything against this act."

Here again are to be found the same blunders and serious omissions, but no notice can be taken of these defects in this place, except that in note[2] —for there is little reason to doubt that upon the ambiguity occasioned by these omissions, the power given *de facto* to the justices has been attributed to the keepers, which if true, would have made these keepers equal in authority to the justices of assise. Whereas the keepers are according to this act subordinate officers doing the duty of constables, by indicting or *taking* the offenders:

[1] The word *same* is equally an interpolation.

[2] These words between the brackets are omitted in the English version, but are in the original French, thus, "les dilz justices" in both cases.

[3] *Garde* in the original.

in fact, wardens of the peace acting within their wards. As to the justices named in this act, not a word is necessary to be said touching them, since it is acknowledged by the title and by the translation they are justices of assise, though even in this particular the wording of the act is ambiguous, both as regards the original and its version.

The next act depended upon as showing the keepers of the peace to be justices of the peace, is fortunately very short, and may be dismissed in a few words; it is the 18 Ed. 3, c. 2, and appears under the same kind of fallacious title as the others—thus, "Justices of the peace shall be appointed, and their authority."

"Item, that two or three of the best of reputation in the counties shall be assigned keepers of the peace by the King's commission, and at what time need shall be, the same, with *other wise and learned* in the law, shall be assigned by the King's commission, *to hear* and *determine* felonies and trespasses against the peace in the same counties, and to inflict punishment reasonably, according to [*law and reason* and] [1] the manner of the deed."

[1] These words between the brackets are not in the original, and their interpolation gives a nonsensical reading to the act, the words in the original being, "et punissement faire resonablement selonc la manere du fait."

This chapter provides for the preservation of the peace in future, by decreeing whenever need shall be, the issuing of the usual commission of *oyer* and *terminer*, and differs in no material point from the ordinary forms even now in use, except that this ancient ordinance is short and precise, whilst modern forms are long and diffuse. The term keepers of the peace is herein used as a general appellation given to persons put into authority, though only for a time, and has no relation to any particular justices whatever, much less to justices *quoad* justices of the peace. Besides this chapter cannot be cited in proof of the institution of "*gardeins de la pees*," keepers or wardens of the peace, since the previous statutes have mentioned them; the only distinction made here is, that these wardens or keepers are to be appointed by the King's commission, and the contrary is not expressed in the other acts, nor is any form of their creation given. And it will be found, in the next section of this work, that even justices of the peace were not placed in or appointed to commissions of *oyer* and *terminer* until some years after their institution.[1] And

[1] By the 42 Ed. 3, c. 4, A.D., 1368, a period of six years from the first institution of justices of the peace *eo nomine*, and of nineteen years from their true origin, and of twenty-four years from the date of the statute now under consideration.

this ordinance appears as a matter of necessity arising out of the decree of the previous chapter of this statute, which abolished all former commissions of new inquiry, saving certain indictments which are to be determined in the King's Bench.

The statute next in order, the last, and the most important to be considered in this section, is the 34 Ed. 3, c. 1, which formed the basis of the proceedings in the "remarkable case." That each part or period may be consulted separately, as well as viewed and considered as a connected whole, the statute is here divided into several clauses by marginal numbers, and by this means my observations will be the more clearly understood. The title under which this act appears in the statute book is as objectionable as the titles of the other acts or chapters already noticed, and upon the same grounds; and is with its chapter as follows:—

"What sort of persons shall be justices of the peace; and what authority they shall have": —

Clause 1. "First that in every county in England, shall be assigned for the keeping of the peace, one lord, and with him three or four of the most worthy of the county with some learned in the law,

C. II. "And they shall have power to restrain the offenders, rioters, and all other barrators, and to pursue, arrest, take, and chastise them according to their trespass or *offence*;[1]

C. III. "And to cause them to be imprisoned, and to be duly punished according to law and customs of the realm, and according to that which to them shall seem best to do by their discretions and good advisement;

C. IV. "And also to inform them, and to inquire of all those that have been pillors and robbers in the parts beyond the sea, and be now come again, and go wandering, and will not labour as they were wont in times past, and to take and arrest all those that they may find by indictment, or by suspicion, and to put them in prison;

C. V. "And to take of all them that be not of good fame where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people, and the other duly to punish.

C. VI. "To the intent that the people be not by such rioters or rebels troubled nor endamaged, nor the peace blemished, nor merchants nor other

[1] The word in the original is "*mesprision*," and should have been rendered into English by the word *default*, and not *offence*.

passing by the highways of the realm disturbed nor put in peril, which may happen of such offenders.

C. VII. "And also to hear and determine at the King's suit all manner of felonies and trespasses done in the same county according to the laws and customs aforesaid; and that writs of *oyer* and *determiner* be granted according to the statutes thereof made, and that the justices that shall be thereto assigned be *named by the court*, and *not* by *the party*.

C. VIII. "And the King will, that all *general* inquiries before this time granted within any signiories, for the mischiefs and oppressions which have been done to the people by such inquiries shall cease utterly and be repealed;

C. IX. "And that fines, which are to be made before such justices for a trespass done by any person, be reasonable and just, having regard to the quantity of the trespass, and the causes for which they be made."

Now in order to arrive at the true character of this celebrated act, it will be necessary to compare the several clauses with those acts already quoted touching the keepers of the peace and trial of offenders; and in so doing some observations will

be made, and some facts drawn from other sources, by way of illustrating the subject, and assisting this examination.

The four first clauses are nothing more than a more detailed and explicit direction than is found in the previous acts, touching the keeping of the peace, and the arresting and bringing offenders to justice; that they may be tried by the inquiry of judges at *oyer* and *determiner*, for which purpose writs are to issue according to the 7th clause. In the 1 Ed. 3, s. 2, c. 16, there is no mention of "one lord" and the number of persons with him; and no powers are given by that act.

The 2 Ed. 3, c. 6, can have no relation to this act of the 34 Ed. 3, since it relates to justices of assise appointed for a particular purpose only by the Statute of *Winchester* in the reign of Ed. 1, still less does it relate to justices of the peace.

The 18 Ed. 3, s. 2, c. 2, also made no mention of the "one lord," and these several clauses are generally an extension and the completion of the 18 Ed. 3, since they fully carry out the commission promised, "at what time shall need," in that act. The "one lord," named in the first clause of this 34th of Ed. 3, demands a few lines, by the way, for the purpose of showing that he could not have been either *custos rotulorum* or lord

lieutenant, notwithstanding it has been asserted that the one lord named in this statute was the lord lieutenant, and therefore that this act related strictly to justices of the peace according to its title. If this act so clearly referred to justices of the peace as has and still continues to be affirmed by some, how is it that in the history of the office of *custos rotulorum* it is said, "there is no distinct trace of its first constitution; but it probably arose very soon after the holding of sessions of the peace began, from the necessity or convenience of having some high and responsible officer to keep the records, which before were promiscuously dispersed among the justices."[1] The 37 Hen. 8, c. 1, states that the lord chancellor hath before this time appointed the *custos rotulorum*, but that "divers and sundry persons being not learned nor yet meet ne able for lack of knowledge and learning to occupy and exercise the said office of the *custos rotulorum*, and of the clerkship of the peace, have gotten the said office." To remedy this evil the King is to appoint under his own signature fit persons to be *custos rotulorum*, who may appoint a deputy. And he is to appoint the clerk of the peace, who may also execute by deputy. And the archbishop

[1] Dickenson's Quarter Sessions, by Talfourd, p. 58.

of *York*, and bishops of Ely and Durham, and others may appoint the *custos*, as by letters patent already granted.[1] This is the first statute met with in the statute book upon the subject of *custos rotulorum;* but the reader will see that no "high and responsible officer is appointed or named;" nor was "a man especially picked out for wisdom, countenance, or credit."—(*Lambard.*) And there is no doubt but that the judgments of justices of the peace in sessions were matters of record, as in the 1 Rd. 3, c. 3, they were to let to mainprise, "in like form as though the same prisoners and persons were indicted thereof of *record* before the *same justices.*" And even fifty years previous to this last act, by the 15 Hen. 6, c. 6, A. D. 1436, these words are found, "*qil serra de ceo par due processe & loiall maner convict* de record *devaunt ascum des ditz justices du peas*, &c." The appointment, therefore, of a lord lieutenant and *custos rotulorum* in the same person, is comparatively of modern date, and unknown in the 34 Ed. 3. And as to the lord lieutenant, no such officer existed in the time of Edward 3; Blackstone[2]

[1] In the 3 and 4 of the succeeding reign this power again fell into the hands of the lord chancellor, but it is now resumed by the King.

[2] Comment. bk. 1, c. 13.

mentions them as taking their rise about the time of Henry 8, and quotes Camden as speaking of them in the time of Elizabeth, "as extraordinary magistrates, constituted only in times of difficulty and danger." And it must also be borne in mind that this statute of Edward 3, relates to the trial of offenders at criminal law only, and is totally distinct from the commission of array. But were it otherwise, then the lord lieutenant, or, the "one lord," would have been a mere military officer, and not as now a justice of the peace.[1]

What now becomes of the "one lord," as stated in this statute? The "one lord" very probably suggested to some law demigod of old the splendid idea of a lord lieutenant, and *custos rotulorum*, who with "three or four of the most worthy and some learned in the law," in the opinion of the black-letter divinity, constituted the justiciary of the counties and the bench of quarter sessions: hence this statute was made to apply to justices of

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[1] Under the title lord lieutenant in the Penny Encyclopædia we find—"The form of the commission of lord lieutenant was settled by statute in 5 Hen. 4."—See parliamentary rolls, 1403—4. In 1545 the duke of Norfolk was made the King's lieutenant. The present office of the lord lieutenant and that of the ancient King's lieutenant differ in all respects, as much as the office of constable in our day differs from that of the feudal times.

the peace, and taken as a model by which our commission was reframed by the sages of the 30th of Elizabeth. And modern gentlemen, "learned in the law," as the phrase goes, have taken the hint, and follow the example of their wise masters.[1]

In considering the fifth clause of this act, (the 34 Ed. 3,) it will be found that the keepers of the peace therein mentioned, must have been of a different class and order of ministers of justice from the keepers named in the 4 Ed. 3, c. 2, which enacted, "that such as shall be indicted or taken by the said keepers of the peace, shall not be let to mainprise, &c., or delivered but at common law." The keepers being now joined "with some learned in the law," for the purpose of forming a commission of inquiry, having power to let to mainprise and take surety, may therefore be taken as a proof of the use of the term "keeper of the peace," as a general title given to those to whom the peace of the country was entrusted, whether as constables or commissioners.

This fifth clause, however, is of singular importance, since it gives to the keepers the power of

[1] It appears to me that these appointments of "the one lord, and with him three or four others," partake of the nature of the *Missi dominici* of Charlemagne.

"binding over to the good behaviour" as it is called, or more correctly, "the taking surety for the good behaviour" under extraordinary circumstances; namely, to take surety of all them that be NOT of good fame—the OTHER duly to punish! The *other*, who are they? Certainly those that be of good fame! But this is absurd. Yet is it according to the wording of the *English version* of this statute. Such is now unquestionably the law, and has so been for a period of 300 years or thereabouts; and must continue to be so taken by justices of the peace as they find it. But as the wording of this clause constitutes one of the great defects of our statute book, all further observations must be referred to the Appendix, wherein it will be more particularly considered.

The clauses six and seven may be taken together, the sixth merely stating the intent of the preceding clauses; and the seventh directing the trial of "all manner of felonies and trespasses by writ of *oyer* and *terminer* for that purpose to be issued," and that the justices thereto named shall be chosen by the court and not by the party, which justices are especially set forth in the first clause of this act as "some learned in the law." But justices of the peace even now, in their general quarter sessions, do not try all

manner of felonies, &c., by any writs of *oyer* and *determiner*, but merely by the power of their general commission, try *some* felonies, &c. And upon the presumption that justices of the peace are comprehended by this statute, then the trial of felonies by them must have been in their own court of quarter sessions, which must then have been, as now, a court of record. But in the several acts passed touching records, no mention of the court of quarter sessions occurs, even down to the 11 Hen. 4, c. 3, which like the first act on the statute book regarding records, (the 9 Ed. 3, s. 105,) relates to the assises. The 7 R. 2, c. 5, directing justices of the peace to send vagrants to the nearest gaol, there to remain until the coming of the justices of gaol delivery, (pur y demorer tanqe a la venue des justices assignez pur deliverance des gaoles,) may be taken as a proof of the inability of justices of the peace to try prisoners by a jury in sessions at that time, (an. 1383.) For it is imposible to believe that they might "try all manner of felonies and trespasses," and yet not have the power to try so small a misdemeanor as an act of vagrancy.[1]

[1] In fact the justices of the peace could only *inquire*, take surety of the accused, and imprison those who would not find such surety, even in cases of vagrancy in which they now have power to determine by summary conviction.

But we find in Cobbett's Parliamentary History,[1] that a petition was presented by the Commons to Edward 3, in the 21st of his reign, "that the chief of every county may be justices of peace, and that they may determine all felonies." This received the following cautious answer, "The first is granted; for the second the King will appoint *justices learned in the law.*" It is clear, therefore, that at this early time, (an. 1347,) those who tried felonies must have been the judges. We may decide that neither the keepers of the peace, on the presumption that they were a local and permanent justiciary, prior to the 34 Edward 3, nor justices of the peace prior to the 7 Richard 2, had power to try in sessions all manner of felonies as judges in a court of record.

Nothing can be more clear than such a court of quarter sessions, with power to try all manner of felonies, could not have existed in the days of Edward 3, nor for long after, since history, and more particularly the history clearly written by our statutes, fully demonstrates the gradual increase of the power and jurisdiction of the justices of the peace, until at length these magistrates

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[1] Vol. i., col. 113.

fully accomplished all the purposes of the old view of frankpledge, and had consigned to them the power of trying certain, but not all manner of felonies.[1] The view of frankpledge in early times, and the power of the justices of the peace aided by the constable in latter days, constituted in strict language that which is designated by the term Police.[2]

The eighth clause declares all former commissions to be abolished; and the last clause merely directs the fines to be reasonable.

Having now gone through the proposed examination of the several statutes of Edward 1, and Edward 3, upon which dependence has been placed by law writers and historians for support of their mere and disputed assertion, that the origin of the Justice of the Peace is found in that of the keepers of the peace; and concluding from such examination that all those statutes can have no relation whatever

[1] Our present commission as settled in the 30 Elizabeth, was, doubtless, formed upon the mistaken idea, that the 34 Edward 3, gave full power to justices of the peace to try "all manner of felonies."

[2] The view of frankpledge was the original and only means taken to keep the peace, as is mentioned in magna charta, 9 Hen. 3, c. 35: "*fiat autem visus de franco plegio sic videlicet quod pax nostra teneatur;*" it will be found hereafter that this custom of frankpledge is strictly connected with the power named in the fifth clause of this 34 Edward 3.

to the title or office of Justice of the Peace, but that on the contrary they relate to justices of assise, or to commissioners of inquiry and of *oyer* and *terminer;* it becomes necessary to strengthen and confirm this conclusion, by extending our considerations to the question, what was the origin of the title and office of the Justice of the Peace? The following section, therefore, is devoted to this further and important object.

Section II.

On those statutes in which the origin of the office and title of the Justice of the Peace may be found.

If any one will condescend to read over those long-neglected pages of our statute book, containing the statutes of labourers, which remain for the most part in their bad Latin or worse French,[1]

[1] When this sentence was first sketched out, the author was not acquainted with that extravagant edition of the statutes of the realm, published by a commission appointed by George 3, in which the statutes that remain in their original language in Ruffhead's edition are translated into English. Particular notice of this royal edition will be found in the Appendix.

and take the trouble of tracing the course of legislation upon labour, and the price of provisions, and articles of common apparel, from the 23rd Ed. 3, to a period not even later than the reign of Richard 2, he will be enabled to obtain a much more satisfactory history of the institution of the office and title of Justice of the Peace, properly so called, than that given by law writers and historians, even of great and deserved celebrity. Let it be here remarked that the expression "office and title of justice," &c., is used because the office existed 11 years before the title of Justice of the Peace was acknowledged in the statute book. The statutes of labourers were occasioned by the very unhappy condition of the country at the time of their enactment (A.D. 1349-51), and the utmost efforts of that illustrious and able monarch, Edward 3, were required to restore the nation to a state of peaceful repose. For it will be found by a reference to the statutes of the previous part of this King's reign, that the ordinary modes of administering justice, aided by various commissions of inquiry issued from time to time, and amongst them those commissions, including the keepers of the peace, were not only insufficient to accomplish that

desirable purpose, but had actually aggravated the evils they were intended to redress. [1]

A lamentable cause had given rise to a new species of offence, or at least to make that common which might have existed previously but to a small extent, and therefore new laws became necessary to meet the new and disordered state of things. Perhaps we should take into consideration the discontents of those labouring classes, that were not free labourers, but who according to Froissart, "were bound to do the labour for the nobility, prelates, and gentlemen in England," [2] discontents which formed doubtless a large share in producing that rebellion which broke out in the succeeding reign of Richard 2. It is more than probable that the plague was merely used as an ostensible reason for this politic step of Edward, who, by appointing the justices of labourers, thus brought the whole working population under the immediate control of government.

The preamble or introduction to the first of

[1] Illustrated by the 8th clause of 34 Ed. 3, 1. Such too was the corrupt state of the administration of justice, even in the time of Charlemagne. See Essais sur l'Histoire de France, par M. Guizot, 4th edit. Paris, 1836, p. 264.

[2] Froissart's Chronicles, by T. Johnes, vol. ii. c. 135, p. 459, 4to., 1814. Consult also Thierry's Histoire de la Conquête de l'Angleterre par les Normand's, tom. iv. p. 352, and following.

these statutes of labourers, the 23 Ed. 3, sets forth the cause, at least the ostensible cause, and the evils with singular brevity; it is as follows:— "Because great part of the people, and especially of workmen and servants, late died of the pestilence, many, seeing the necessity of masters and great scarcity of servants, will not serve unless they may receive excessive wages, and some rather willing to beg in idleness than by labour to get their living; we, considering the grievous incommodities which of the lack especially of ploughmen and such labourers may hereafter come, have upon deliberation and treaty with the prelates, and the nobles, and learned men assisting us, of their mutual counsel ordained," &c.[1] As this statute is very long, a sketch only of its chapters can be conveniently given in these pages, but the original may be read in the first volume of the statutes of the realm, a copy of which is in the King's Library of the British Museum, and in the libraries of our universities.

In this first statute of labourers the experiment

[1] The English translation begins in these words, for which there is no authority in the Latin original:—"Edward by the grace of God, &c., to the reverend father in Chrjst, *William*, by the same grace Archbishop of Canterbury, greeting;" and the concluding words show this to be an ordinance of the King in council and not an Act of Parliament.

was tried of reducing these refractory extortioners to obedience by bringing them before the sheriffs, bailiffs, lord or constable of the vill, and on the offence being proved by two substantial witnesses they were to be committed to the nearest gaol, there to remain until they should find sureties for their service according to law. Servants offending might be sued for their fines in the Lord's Court, *curia Domini*, and the lord or others paying more than the old accustomed wages were to be sued in "the councils of Wapentake, and tithings, or any of the King's courts of the like kind." With respect to the price of provisions the mayors and bailiffs of cities, &c., were to punish offenders against the statute; and the justices of assise were to punish the mayors and bailiffs on neglecting to observe the statute, and the seventh chapter forbids anything to be given to sturdy beggars refusing to work, even though given under the colour of piety or of almsgiving. [1]

Throughout the whole of this statute no mention whatever is made of keepers of the peace, though every other subordinate minister of justice is named. Is it, therefore, unreasonable to infer that, if such a minister of justice had existed at

[1] It is a misfortune for modern times that this last chapter has been entirely lost sight of by poor law reformers.

that time he would have been appointed to adjudicate in all matters named in this statute? And taking into consideration the peculiar province of such a magistrate as the supposed keeper of the peace, or justice of the peace, such as he is really found to have been, even so early as the time of Richard 2, may it not with equal fairness be inferred that had any county justiciary existed and in actual operation from so remote a period as Edward 1, it would have been enumerated at least in this statute, even though it might not have had the entire jurisdiction in these matters? But as this statute may be said to give a negative kind of evidence, and to leave the principal subject in question on very debateable ground, no other conclusion will be drawn from it than that it shows the great cause which led to the institution of the Justice of the Peace to the exclusion of the keepers of the peace.[1]

The next succeeding statute in the book, a statute which bears the stamp and title of an Act of Parliament, is also with very tolerable correctness entitled "a statute of labourers made anno 26 Ed.

[1] I particularly recommend this statute or ordinance to the most careful and studied perusal of my readers; it is singularly illustrative of the bad legislation of our English Justinian, Edward 3.

3, stat. 1, and A.D. 1350." This statute is written entirely in old French, and no other part of it is translated than the preamble, which is here given at full length on account of its important information,[1] but a sketch only of its seven chapters will be sufficient in this place.

"Whereas late against the malice of servants, which were idle, and not willing to serve after the pestilence, without taking excessive wages, it was ordained by our Lord the King, and by the assent of the Prelates, *Earls*, *Barons*, and others of his council,[2] That such manner of servants as well men as women should be bound to serve, receiving salary and wages accustomed in places where they ought to serve in the 20th year of the reign of the King that now is, or five or six years before; and that the same servants refusing to serve in such manner should be punished by imprisonment of their bodies, as *in the said statute*[3] is more plainly contained; *whereupon commissions were made to divers people in every county to enquire and punish*

[1] The whole of this statute is translated in the royal edition.

[2] This sentence clearly proves the former statute to have been a mere ordinance of the King in council, though placed in the book as a statute; and the words "*Earls*" and "*Barons*" are substituted for the word "*Nobles*" in the original French.

[3] In the orginal the words are "*en mesme lordenance.*" Why it should be be so pertinaciously called a *statute* is not at this time to be easily explained.

all them which offended against the same. And now forasmuch as it is given the King to understand in this present parliament, by the petition of the commonalty, that the said servants having no regard to the said ordinance,[1] but to their ease and singular covetise, do withdraw themselves to serve great men and other, unless they have livery[2] and wages to the double or treble of that they were wont to take the said twentieth year, and before, to the great damage of the great men, and impoverishing of all the said commonalty whereof the said commonalty prayeth remedy; wherefore in the same parliament by the assent of the said Prelates, Earls, Barons, and other great men of the same commonalty there assembled, to refrain the malice of the said servants be ordained and established the things underwritten."

The first chapter of this statute regards the remuneration of labourers in husbandry. The second relates rather to the pay for task-work than

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[1] The words, "the said ordinance" are correct according to the original, but as it was called a statute just before, they appear to be incorrect; thus proving the word "statute" to be given in error.

[2] These words, "*livery* and *wages*," do not give the remotest idea of the sense of the original words, "*liveresons et lowers*," the true meaning of which is illustrated by the two first chapters of this statute; but a critical examination must be left to the learned reader.

the mere question of wages, and enacts that labourers shall not depart in the summer from the places in which they dwelled in the winter season, and the observance of these rules and the punishment of offenders is also declared to be in the power *of the Lords, Seneschals, Bailiffs,* and *Constables* of the vills or towns. The third and fourth chapters relate to artificers and their labourers, and to the price of shoes;[1] and JUSTICES are *to be assigned* to adjudicate in these matters, *et discretion des justices qi serront a ce assigner.* The fifth and sixth chapters relate to the punishment of the said seneschals, bailiffs, and constables, the lords being omitted, who shall neglect to observe this statute, and also to fines and their application, and these matters are to be adjudicated by the justices of assise, when they shall come into the country; and they are also to have power to fine the labourers and artificers, &c. The seventh and last chapter requires some few observations, since from its position and numerical order in the statute-book, considerable ambiguity arises, but had it been placed the fourth or fifth in succession no doubts could have arisen. However, the full con-

[1] Even rents of houses, used for the staple were regulated shortly afterwards by the 27th Ed. 3, c. 16.

clusion which I would draw from it, and the interpretation here given of it may be questioned, and even thrown aside without any material detriment to my argument, which will be fully borne out by the next succeeding statutes. This seventh chapter states that "the said justices shall hold their sessions *at least* four times a-year, that is to say, the Annunciation of our Lady, Saint Margarette, Saint Michael, and Saint Nicholas, *and also as often as may be required*, at the discretion of the said justices."

Now, by a previous statute (4 Ed. 3, c. 2,) the justices of assise and of gaol delivery were to hold their sessions three times every year in each county, and as this is the first statute in which any justices hitherto named were to hold their sittings four times in a year in each county, it is not too much to presume that this statute first established the quarter sessions.[1] Had this seventh

[1] That these quarter sessions may not be confounded with the assises the following observations touching the periods assigned to the holding of the assises in every county should be borne in mind. Blackstone, bk. 3, c. 4, states that the judges of assise were appointed by the parliament of Northampton, A.D. 1176, 22d Hen. 2, and that they made their circuit once in seven years; afterwards by *Magna Charta*, c. 12, to be sent into the country once a-year; and that they usually make their circuits in the vacations after Hilary and Trinity Terms twice a-year. It is singular that Blackstone should, in citing the 4th Ed. 3, c. 2, to illus-

chapter been placed in order next to the third and fourth, it would have been quite clear that the justices therein named referred to the justices to be assigned to this purpose, as the words of the third chapter import, ("*des justices qi serront a ce assignez*"), but being placed the last in the statute it is barely possible that the first words of the chapter, "*Item qe les ditz justices,*" may relate to those justices named in the fifth chapter. Though the sixth chapter, when enacting "that sheriffs, constables, bailiffs, gaolers, clerks, of justices or sheriffs, or other minister whatever shall not take any fees of the said servants," does not name or allude to any justices in particular, whether justices of assise or otherwise. And it is further to be observed that the keepers of the peace are in no part of this statute alluded to; nor is any mention made of them in the 27th Ed. 3, stat. 1, c. 3, by which a new commission of inquiry was granted

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trate "the prudent jealousy of our ancestors" in ordaining that "no man should be judge of assise in his own country," have omitted to cite the same Act for the periods at which such prudently-selected judges should hold the assises, namely, "that the said justices shall take the assises, juries, and certifications, and deliver the gaols at the least *three times* a year, and more often if need be." What now becomes of the prudence of our ancestors, since justices of the peace *residing* in the country try almost "all manner of felonies and trespasses," and are surrounded by and intimately connected with those they judge.

to enforce the statute of labourers, and to punish the innkeepers and other "regraters of victuals," on account of the "great and excessive dearness of food."

It is singularly remarkable that these statutes of labourers should have been neglected by law writers when treating of the origin of the Justice of the Peace and quarter sessions. One cause, probably, of this neglect may be found in the marginal notes of the statute books declaring these statutes to be repealed by the 5th of Elizabeth ;[1] perhaps, also, another cause of this neglect is to be found in the circumstance of these statutes remaining in their original french down to the year 1810. The law writers go no further back than the 36 Ed. 3,[2] for the most early statute touching the origin of, and the periods for holding quarter sessions ; some only to 2d Hen. 5.[3] Thus Blackstone, by some strange inadvertency, in the very same page and sentence in which he quotes this statute of 2 Hen. 5, as giving the origin[4] for the periods

[1] The 5th of Eliz., though it repealed these statutes of labourers, re-enacted them in nearly all their original severity and absurdity.

[2] Dickenson's quarter sessions, p. 46 ; and Burn's Justice, vol. 5, p. 583, by Chitty.

[3] Blackstone's Com. bk. 4, c. 19, p. 271.

[4] If Blackstone did not mean it to be inferred that this statute, 2nd Hen. 5, gave the origin of the quarter sessions, why did he not quote the earlier statutes ?

assigned for holding the quarter sessions, sets forth the stat. of the 34 Ed. 3, as originating the powers of that court, which upon his own showing, could not have existed till twenty-five years afterwards. How is this statement to be reconciled ? But if he had cited the 25th Ed. 3, for the origin and the periods of holding the quarter sessions, then a *primâ facie* reason for citing the 34th Ed. 3, c. 1, as giving the origin of the great powers of the quarter sessions, would have appeared, and Blackstone would have been consistent with himself and others. But almost all men, learned or unlearned in the law, have passed over these two important statutes, the 23rd and 25th Ed. 3, with perfect indifference. Even that lover of the antique, Blackstone, has passed over these statutes of labourers in silence, when writing expressly upon the subjects of master and servant and vagabonds.[1] Yet these statutes, though some may consider them of no importance as matter of law, are, as historical relations of very considerable value. The political economist may study them, and trace their effects through enactments over a period of several centuries with singular advantage; he will then discover the consequences of restricting the

[1] Ibid, bk. 1, c. 14, the stat. quoted is 5th Eliz.

price of labour, of confining the labourer to a limited district around his domicile, and the consequent necessity of limiting the price of provisions, &c., to an equally pernicious *maximum;* and he may also find in these statutes and the subsequent enactments to support their ill-digested provisions, the great primary cause of those still more pernicious, destructive, and unconstitutional laws—the poor laws of Elizabeth.[1]

Although law writers do not refer to the 25th Ed. 3, for the date of the institution of the quarter sessions, yet it is so cited by Thomas Corte, in his General History of England, vol. 2, p. 551, and as this history was published in 1750, it might have been consulted by Blackstone and others subsequent to that date. The index to the first volume of the royal edition of the statutes refers also to this statute for the sessions, but the law books published since 1810 do not notice it at all. Before proceeding to the consideration of the next statute, so essential to that view of the question

[1] The author of this book proposes to publish in the form of a pamphlet his thirteen letters on the Poor Laws, which have already appeared in the *Windsor and Eton Express* (an. 1837). In this proposed pamphlet the subject will be more fully treated, and a new part will be added relative to the present mode of raising taxes for the support of the poor, and on enforcing payment by distress upon the goods of the poor defaulter.

taken by me relative to the origin of the Justice of the Peace, namely, the 31st of Ed. 3, I must bestow a passing word or two upon the 27th of this reign. We find that by this 27th Ed. 3, stat. 1, c. 3, a new commission of inquiry was issued on account of the "outrageous dearness of food," &c., caused by innkeepers and regraters, &c., and also to inquire into the labourers and all others touching the statute of the 23rd of Ed. 3, the statute of labourers. Now, as this happened between the 18th and 34th of this reign, and consequently during the full and continued powers of the "keepers of the peace," if such an order of justices ever had a permanent existence, and before the justices of labourers or justices of the peace were fully organized, is it not remarkable that the keepers of the peace are not mentioned in this 27th Ed. 3?—and is not this total silence an additional negative proof that the keepers who could try all manner of felonies, offences, and trespasses, were not known as a permanent body of justices; indeed they are never mentioned in any other statutes but those few by which they were appointed from time to time.

The next statute of importance to this inquiry is the 31 Ed. 3, stat. 1, c. 6. This chapter, like most

relating to labourers, is not translated in Ruffhead's and all former editions, but it is not on that account to be neglected : in fact it is of singular interest in the history of the origin of the Justice of the Peace, and constitutes a great and certain step towards completing the history in this section. This short chapter appears under the English title of "The Lords of franchises shall have the fines of labourers and servants, &c. forfeited." It recites that by the former statutes, "the fines and amercements of servants, artificers, and others, adjudged by justices of labourers (*ajuggez devant justices des laborers*) should be to the King," &c. It is now agreed that the Lords of the franchises shall have the fines so long as the *justiciary of labourers* shall endure, (*tout come la justicerie des laborers dure*), and that the said Lords shall contribute and pay the fees to those Justices of labourers according to the amount of the produce of the profits which they may receive, ("*qe les ditz seignurs facent contribution a paiement des feez de tieux Justices des laborers solonc lafferant des profitz qils enprendront.*")[1]

Thus far, then, it is perfectly clear that, for the purpose of creating a tribunal that should be of easy access, and in every part of the land, the jus-

[1] Ruffhead's edit. vol. 1, p. 292.

tices promised in the third chapter of the 25th Ed. 3, had been appointed; that those justices, within six years from their first appointment, formed a complete body of ministers of justice here, in this statute of the 31st of the same King, recognized as a JUSTICIARY OF LABOURERS; and thus a new title, created by royal commission, and publicly acknowledged by the statute law, is first named on the statute book under the appellation of the JUSTICE OF LABOURERS,[1] their court being the *Curia Domini* of the place.

Some few observations must be made in this place upon the 34th Ed. 3, as it comes next in order; and notwithstanding the first chapter only has hitherto been considered to relate to the justices of the peace, under the title of keepers of the peace, yet it will be very speedily seen that the ninth, tenth, and eleventh chapters bear directly upon my subject. These chapters confirm the former statutes relating to labourers, and add some new regulations besides enlarging the jurisdiction of the justices of labourers therein expressly named.[2] These chapters of this cele-

[1] The persons first acting, and by a fair inference first appointed, being the seneschall and bailiff in the courts of the Lords of the place, of which hereafter.

[2] The English version of these chapters may be read in the royal edition of the statutes of the realm.

brated statute of the 34th Ed. 3, are here brought into notice, since it must appear, to every one who may take the trouble to examine for himself, not a little singular that, in that statute which is said to have given plenary power to justices of the peace as keepers of the peace, the justices of labourers should be recognized, their powers confirmed, and their jurisdiction enlarged, when the keepers, if they had had any of the powers now or at any time possessed by the justices of the peace, would have been enabled to carry out the statutes of labourers with equal if not with superior effect. Yes, with much greater effect, as it is not to be doubted but that a justiciary, such as the keepers of the peace are said to have been, that had existed and been in full operation for more than a century, or, perhaps, if they ever existed, for several centuries, must have possessed advantages incalculably greater than a new justiciary so recently established as that of the justices of labourers at that particular time. These chapters too, are of great importance, since they demonstrate the singular fact that the keepers of the peace and the justices of labourers are both recognized in the same statute, and therefore were contemporaneous. And it is clear from the wording of the several chapters of

this statute that they were distinct ministers of justice, possessing distinct powers and a separate jurisdiction assigned to each of them. Not only were their powers distinct, but so vast is the distinction that the keepers exercised the right and jurisdiction of the judges of the land to try all offences and to deliver the gaols, whilst the nascent justices of the peace, known then by the title of justices of labourers, had a very narrow jurisdiction, limited to a particular class of persons and to a small number of offences specified by certain statutes.[1]

That statute which stands next in order upon the statute book, touching this inquiry, is the 36th Ed. 3, c. 12, and it is cited in many law books as the authority for determining the periods for holding the quarter sessions ; but in no book that has yet, during a laborious search, come within my view, has this statute been fairly and truly quoted. It is as far as these periods are concerned nothing more than a repetition of the provisions of the 25th Ed. 3, c. 7, and the reader may determine this point for himself by comparing the words of both in the

[1] In the next section the reader will find some observations on the keepers of the peace, and illustrated by an important extract from M. Guizot's last cited work, p. 451.

following extract from the royal edition of the statutes of the realm :—

In the 25th Ed. 3, c. 7, the times are, "The Annunciation of our Lady, St. Margaret, St. Michael, and St. Nicholas." In the 36th Ed. 3, the times are, "Within the utas[1] of the Epiphany, within the second week of Lent, between the feasts of the Pentecost and St. John Baptist, and within the eight days of St. Michael."

Little or no doubt remains, therefore, but that the quarter sessions must have taken their rise from the 25th Ed. 3, a fact that has been overlooked by all the law writers who have pretended to give any history of the origin of this important court of law.

But the most important fact brought to light by this 36th Ed. 3, is, that it is the first statute in the book in which the title of Justice of the Peace occurs, and that which gives to this Act a high degree of interest, and renders it of considerable value to my inquiry, is the peculiar manner in which this title is blended with the former title of Justices of labourers. The first words are, "Item, that in the commissions of JUSTICES OF THE PEACE AND LABOURERS it shall be expressly men-

[1] In the original French this word is "*octaves*."

tioned that the same justices shall hold their sessions four times a-year, that is to say," &c.[1] This Act clearly shows that the Justice of the Peace and Labourers is one undivided title, having reference to one and the same person, and it will be shortly seen that the title of Justices of Labourers finally merged in that higher and more dignified title of Justice of the Peace. Before, however, proceeding to examine other statutes a little digression may be made upon the manner in which law writers have cited this Act, and a few observations added upon the evidence contained in this section.

It appears to me that two omissions or oversights have been made by the editors of Burn's Justice[2] and Dickenson's Quarter Sessions,[3] well deserving our serious attention. In both these works it is distinctly stated that the periods for holding the quarter sessions are fixed by the 36th Ed. 3, just twelve years after the second statute of labourers. The first omission is, therefore, in not noticing the seventh chapter of 25 Ed. 3; and this omission by them is evidently the result of a habit

[1] The Original French is as follows:—" Item qe en les commissions des justices de la Pees et des laborers soit faitê expresse mention qe mesmes les justices facent leur sessions quatrefoitz par an cestas-savoir, &c."

[2] Vol. 5, p. 583. Ed. 1837, by Chitty.

[3] Talfourd's edit. p. 46, 1838.

of taking for granted the opinions of others, or the representation made by others, of particular statutes, without strictly examining for themselves. Upon this principle, *Eyre*, C. J., attributes to the 2nd Hen. 5, the origin of the different kinds of sessions,[1] the one *quarter* sessions, and the other *general* sessions, held at intermediate periods, from the words in that Act stating "and more often if need be;" whereas, had the Chief Justice investigated the subject by his own research he would have found this very power of holding sessions, at other than the fixed quarterly periods, had been originally given by the seventh chapter of the 25th Ed. 3,[2] just sixty-four years previous to the date of the Act he cited.[3] The second omission appears in using the title of Justices of the Peace only, thus entirely neglecting the adjunct "and labourers." But this latter omission may be defended, by some incautious reader, upon the plea that the expression "Justices of the Peace and labourers" means two distinct orders of justices having no identity of power, duty, or title, yet no one has attempted to set up two distinct orders, or species of quarter sessions, nor has any writer mentioned a quarter sessions held by justices of

[1] Ibid. Note, p. 47.

[2] See *supra*, p. 37, and following.

[3] See note 22, p. 270; Blackstone's Com. bk. 4, by Hovenden.

labourers, a title that is not to be met with in modern books, nor in any ancient books that I have met with. But the number of sessions to be held by Justices of the Peace in every year has varied from time to time. By the 14th Hen. 6, c. 4, they were to be held in Middlesex but twice in the year. By the 33rd Hen. 8, c. 10, they were to hold a sessions every six weeks in their hundred or division, for the trial of offenders by a jury or inquest of twelve, before the regular quarter sessions. This was repealed, however, by the 37th Hen. 8, c. 7, in which the nature of the six weeks' sessions is fully set forth. The remainder of this section, however, will clearly fix the identity of the justices of the peace and labourers, and establish the fact that the expression can only be taken in the sense herein given to it, as meaning one officer with the double title. And therefore the 36th Ed. 3, c. 12, constitutes the most important link in that chain of evidence which fully establishes the origin of the Justice of the Peace in the title of Justice of labourers. Thus is the question, at the head of this section sufficiently answered to any impartial inquirer; but as this class of inquirers is infinitely small when compared with the multitudes who decide without any inquiry at all, and allow

themselves to be swayed by that indolence which prejudice engenders, some further observations will be necessary to establish the truth and certainty of this new history.

It cannot but have been noticed by the attentive reader, that commissions of inquiry and *oyer and determiner* made out to the keepers of the peace were granted from time to time for temporary purposes on urgent occasions, were enacted, instituted. and abolished during the time that the statutes of labourers continued in full force, and the justices appointed by them pursued their course uninterrupted by these commissions. In the 34th of this reign two commissions, one of inquiry and one of justices of labourers, went on independent of each other, and were regulated and enforced by different chapters of the very same statute. If the keepers originated the justices, how could both keepers and justices be so contemporaneous as to be recognized as separate commissions, and as a separate class of ministers of justice in the same statute.[1] If the singular history of our statute book he considered it is matter of surprise that so distinct and concise a relation of the rise and pro-

[1] See the several chapters of this statute.

gress of the justices of labourers and of the peace should have found a place in its badly written and imperfect pages; and had there been any statute, or the fragment of any chapter that had the expression of Justice of the Peace and keepers of the peace combined, or in any way similar to the title of justices of the peace and of labourers, or had any statute for the commission of the peace existed which could have led to the supposition that justices of the peace had formerly existed under the title of keepers of the peace, either by reason of any similarity of powers or jurisdiction, then the commonly received opinion and history would have had some real basis in the laws of the realm, and this inquiry would be useless, and the result to which it directly leads would be something more than questionable; whereas the old opinions and history appear to have no other origin and no other support than the bare and bold assertion of Lambard, in his Eirenarcha.

But there are other considerations touching the origin of the Justice of the Peace in the justices of labourers of great importance and of singular interest, the which, though in strict connexion with the statutes, and indeed arising out of them, yet

as it is also necessary to consult collateral history, and to adduce other evidence, must be deferred to the next section of this work.

It is now necessary to pursue the history of the justices of peace and labourers still further, and thus additional extracts must be made from the statute book.

During the further continuance of this reign, statutes were frequently passed touching labourers, in which certain changes were made; but the title of justices of the peace only is given to the justices of labourers. Even in the 14th chapter of the 36 Ed. 3, relating to the fines, &c., paid by labourers, this single title of Justice of the Peace is alone adopted; the title in the 12th chapter, having established the fact that justices of the peace and labourers were to be considered the same as justices of labourers, the title Justice of the Peace alone was evidently sufficient to designate the Justice of Labourers for the future; and thus my evidence may be considered complete.

The 42 Ed. 3, c. 4, is of great importance, inasmuch as it may be considered to be that statute which first gave an extension of power and jurisdiction to the justice of the peace. It declares "that from henceforth, in all inquiries within the

realm, commissions shall be made to some of the justices of the one bench or of the other, or justices of assise, or *justices of the peace*, with *others* of the most worthy of the county, &c." Here no mention is make of keepers of the peace, a term that nowhere appears after the thirty-fourth year of this reign. But it is very obvious that the character of these new justices of the peace must have become highly enhanced, and their utility greatly valued, by being thus placed and associated with the judges of the land in the great commissions. And in the 6th chapter of the 42 Ed. 3, the statute of labourers is confirmed, and a great extension of power is given to the Justices of the Peace, by authorising them "to *hear* and *determine* the points of the said statute, and to award damages at the suit of the party, according to the degree of the trespass;" hence it may be inferred that they now engrossed all the powers of the *curia domini*. These courts were recognised in 15th c. of the 36th Ed. 3, which is celebrated for declaring that all pleas in courts of law shall be in the English language.[1]

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[1] The 1 R. 2, c. 6, 2 R. 2, c. 6, and c. 8, and 7 R. 2, c. 5, may be consulted relative to justices of the peace; and also 12 R. 2, c. 4, 5, 6, 7, 8, & 9, relative to their jurisdiction touching labourers.

In the reign of Richard the Second, statutes were passed to protect the justices of the peace, and the statute of labourers was often confirmed and also amended from time to time; and in the 12 R. 2, c. 3, which directed certificates to be granted by the justices of the peace to labourers of permission to travel out of their hundreds, power is given to those justices in their sessions to fine the mayors, bailiffs, and seneschals of lords, and constables of towns who should neglect to keep the statute, &c. &c. in one hundred shillings, by c. 9 & 10. As this c. 10 is referred to by law writers as that by which wages at the rate of four shillings per diem are granted to justices of the peace, it deserves to be further noticed in this place.[1]

Here also the sole business of these justices relates to the keeping of the statute of labourers, and a further addition to the increasing power of these justices is given in these words—"And they shall inquire diligently, amongst other things, touching their offices, if the said mayors,[2] bailiffs,

[1] By the 14 R. 2, c. 11, "no duke, earl, baron, or baronet, shall receive such wages."

[2] Here is an illustration of the absurdity of dividing these statutes into chapters, since the "said mayors" and "said ordinances" refer to the third chapter, and were not previously mentioned in this 12th chapter.

stewards, constables, and gaolers, have duly done execution of the said ordinances of servants and labourers, beggars and vagabonds, and shall punish them that be punishable by the said pain of one hundred shillings, and those that are not punishable by the same pain shall be punished by their discretion."

In the latter part of this chapter it is enacted, "that no *steward*[1] of any lord shall be assigned in this commission."

Here, then, let it be observed, that these justices of the peace have acquired a judicial power over that class from which they originally sprang, namely, the bailiff and the seneschal, as well as over the mayors, constables, and gaolers; and that a lord's *steward* is now not of sufficient dignity to be admitted to the fellowship of these "complete judges."[2] And in the 7th chap. of the 1st stat. in the next year it appears reference is made to this prohibition of *stewards* ("*seneschal*"), and a new commission is promised.

It would be tedious here to cite or make extracts from all the various statutes touching the increas-

[1] This word *steward* leads to a grand misconception of the true meaning of the act; the word in the original is "seneschal."

[2] Lord Holt said the 34 Ed. 3, c. 1, made justices of the peace complete judges, according to Dickenson's Quarter Sessions, p. 2.

ing power of justices of the peace relative to labourers and to other matters which from time to time were brought under their jurisdiction, very many having been passed in every reign, from the 36 Ed. 3, to the present day, showing every possible gradation of power from the seneschal justice to the country-gentleman justice of our own times.[1]

But the 2 H. 5, c. 4, must have a special notice, as this statute is given in some law books for the authority of justices of the peace for holding their sessions four times a year. This act has already been noticed relative to the period for holding the sessions,[2] and it now remains to be observed, that *the whole* of this chapter relates to labourers and servants only. This act is also very important, since it directs that to be done by the sheriffs which has fallen into disuse, namely, the distribu-

[1] Consult the 13 R. 2, cc. 7, 8, & 13; 14 R. 2, c. 11; 15 R. 2, c. 11; 17 R. 2, c. 9, for evidence of the rapidly increasing power of justices of the peace, by bringing additional subjects under their jurisdiction. In Hen. 5, seven acts were passed; in Hen. 6, fifteen; in Ed. 4, four; in R. 3, one; in Hen. 7, fourteen; in Hen. 8, twenty-four acts: almost all of these relate to the enlargement of the jurisdiction and powers of justices of the peace: but our statute book is so imperfect that no very satisfactory account can be obtained of the total number of statutes touching this important inquiry.

[2] *Vide supra*, p. 39.

tion of the statutes to the justices,[1] after proclamation duly made; and this chapter also contains a direction either confirmatory of the practice of justices in deciding upon the several subjects and complaints relative to these working classes, or establishing their summary jurisdiction on the oath of the parties, on their confession. The important words are as follow:—"And also that the *justices of thepeace*[2] from henceforth have power to examine as well all manner of labourers, servants, and their masters, as artificers, *by their oath*, of all things by them done contrary to their said ordinances and statutes, and upon that to punish them upon their *confession*, after the effect of the statutes and ordinances aforesaid, *as though they were convict by inquest*.[3]

It appears to me that these justices of labourers did from the first convict and punish

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[1] The clerks of justices are now supplied with the acts of parliament; but justices who desire to discharge their important duties conscientiously, are necessarily subjected to a heavy expense in procuring the statutes.

[2] The translation in the book is "justices of peace," but the French words are, *justices de la pees*.

[3] Confessions taken on oath!

offenders against these statutes without the intervention of a jury or an inquest; for this simple reason, that such is universally known to have been the manner of administering justice by seneschals and bailiffs in the courts of their lords. And it may be conjectured that this primitive system had been called in question and made matter of complaint, thus giving occasion for this very law in order to confirm and support the practice. The charge made against the present legislature of a desire to destroy the right of trial by jury, and change, nay destroy, the admirable constitution of our country, because a new law is proposed to enable justices of the peace to try juvenile offenders, exactly consonant with the very principles here recognised by these ancient statutes of the fifteenth century, and acted upon to the present hour in all cases of summary convictions, is more imaginary than real. And it has been seen that these justices of labourers could from the first convict on the evidence of two witnesses, and no intervention of twelve witnesses, or a jury, was required, or has been required by any statute from the 23 Ed. 3, to this 2 H. 5, in these cases. But this is not the place to enter into an inquiry relative to the trial of offences by a jury in sessions

of the peace, either petty or general sessions, the origin of which is involved in great obscurity; neither is it necessary to say any thing of the nature of juries at the time those statutes of labourers were passed, except that the present constitution of juries, and their powers, cannot be dated farther back than the time of Hen. 8. (Lyttleton's Life of Hen. 2, on the origin of juries.) A jury of six, instead of twelve, in certain cases, has also been proposed of late; but even this is not new, since such are named in the 37 Ed. 3, c. 5.

Enough has already been advanced to show that a gradual and natural progress has characterised the history of the Justices of the Peace, and that from the 31 Ed. 3, they were recognised as a distinct justiciary, and have been continued as a permanent body of justices to the present day. And though their character and qualification has varied from age to age, yet one thing has remained constant, namely, that in every age from their humble rank as the seneschal or bailiff of a lord, to their present higher position as men of independence, the statutable qualification has ever been far below the mark expected and required of men holding so high a commission, and entrusted with nearly the

whole of the criminal jurisprudence of the country. Here it is highly important to observe, that justices, whether under the title of justices of labourers or justices of the peace and labourers, or justices of the peace only, had no other power or jurisdiction given to them over any other persons, matters, or things, than those of labourers, servants, artificers, vagabonds, and victuallers, and their wages, for forty years after their first appointment; and that the first act which gave them any jurisdiction over other matters than those expressly named in the statutes of labourers is the 13 R. 2, c. 11, whereby they have power to punish those "workers, weavers, and fullers, that omit to put their seals to any cloth:" thus the only purpose for which justices of the peace were at first created related to the statute of labourers. Let, therefore, this sketch of the origin and history of the Justice of the Peace, deduced from the statute book alone, be compared with the naked assertion—that they originally existed as keepers of the peace, or, were substituted for the keepers of the peace,[1] and it will be conceded by any impartial judge, that the sketch offers a natural origin and a progressive acquirement of power, whilst the naked assertion

[1] Blackstone, bk. iv. p. 428.

has nothing to support it, either in substance or in name, but the mere opinion of some antiquated and doubtful authority.

SECTION III.

ON THE TITLES—JUSTICES, JUSTICES OF PEACE, JUSTICES OF THE PEACE, KEEPERS OF THE PEACE, WARDENS OF THE PEACE, CONSERVATORS OF THE PEACE, COMMISSIONERS, SENESCHALS, MARSHALS, BAILIFFS, CONSTABLES—AS THEY OCCUR IN OUR STATUTES.

To complete this inquiry it may be useful to enter into some examination of the several titles set forth at the head of this section; and though no departure from the principle obviously adopted in this work—that of depending upon the statutes themselves as the only source of certain information—is intended, yet the opinions and statements of learned writers in law and history are too important to be entirely neglected; they must, therefore, be brought under consideration, at least to a limited extent. To enter into a detail or history of those opinions from the time of Henry the Eighth to the present day, would be as unprofitable as

unnecessary, and extend these pages to an unreadable number. This part of my investigation must be limited by the narrowest bounds, and confined to the purpose of showing that an early error has been handed down to the present day, merely by adopting the opinion of some grave writer. But to follow the *dictum* of any man, however high his reputation, without inquiry, and to neglect those statutes and records upon which that *dictum* is supposed or declared to be established, is to indulge a dangerous confidence, and to perpetuate error, the natural results of "that peremptory adhesion unto authority, the mortallest enemy unto knowledge."

Anxious to ascertain the source of an opinion which the statutes themselves in their original language proved, to my mind, to be an error, diligent search has been made in every direction for correct and original information; and it is, to me at least, a lamentable fact that the historical relations became the more confused and uncertain as that search extended into remoter periods of time; and generally, the more ancient the authority and the more celebrated the author in works on law, the less satisfactory is the information, since mere assertion seems substituted for proof. Hence very

many books have been consulted fruitlessly by me, to my great discomfort and loss of time; no mention of them therefore is now made that I may not present my reader with mere learned lumber. If Hume be consulted, the generally received opinion that justices of the peace were instituted by Ed. 1, is repeated, but without any authority being named for the assertion.[1] And when writing upon "the impracticable scheme of reducing the price of labour after the pestilence, and also that of poultry, or fixing the wages of a master carpenter at three pence per diem;" and quoting the 25 Ed. 3, c. 1 & 3, he referred to that very statute which originated the quarter sessions, and the jurisdiction of those justices therein named for the purpose of executing those impracticable laws, yet both these important facts were passed over in silence by that learned historian. The probability is, that he wrote after some law historian or antiquary, trusting to a quotation of a scrap of the statute, and neglecting to search the original source of information.

Henry, in his valuable history of England,[2] falls into a similar error, stating "the institution of

[1] Hist. of Eng. vol. 2, p. 567.
[2] Vol. 8, c. 3, p. 150.

the justices of the peace was confirmed and improved, and their powers enlarged," referring to the statute book, vol. 1, p. 195, 198, 240, corresponding with the statutes of 1 Ed. 3, c. 10; 2 Ed. 3, c. 6; 18 Ed. 3, c. 3: and gives his version of this part of the history of English legislation by stating, "To suppress riots and tumults, and to punish small offences, and determine lesser controversies, and particularly to execute the decrees of the parliament of *Winchester*, this wise prince appointed conservators or justices of the peace in every county." This loose style of broad assertion, whilst every statute to which he referred, including that of *Winchester*, contains a clear denial of his facts, since neither *justices* nor *conservators* of the peace are therein named, renders the evidence of this historian completely nugatory; and it may be taken for granted, that he merely consulted the statutes (if he ever read them at all) through the medium of the translations in Ruffhead's edition, to which work his references by pages relate; and yet no mention is therein made of "small offences, lesser controversies, and decrees of parliament." And, as we have seen, the justices named in the statute of Wynton were

justices of eyre. Rapin [1] writes with greater precision; he states that "Edward made inquiry by commissioners," and makes no mention of justices of the peace, a correctness of writing attributable to a closer investigation, and to his ability to read and to understand the statutes and histories of those early times, written in his native though antique language. In Tyrrell's History of England [2] will be found the mention of justices of the peace instead of commissioners, or keepers of the peace. Hallam [3] also speaks of "*conservators* instituted by the statute of Wynton, (13 Ed. 1,) who were afterwards made justices in the reign of Ed. 3;" but the statute of Wynton names constables and justices of assise; and the word *conservators* is no where to be found in that statute, nor even in the first volume of the Statutes at Large down to the reign of Hen. 6. But this review of the relation of historians is sufficient for the purpose of exposing their incorect information, and demonstrating the little confidence there is to be placed

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[1] Hist. of Eng. vol. 3, p. 224, ed. 1757.

[2] Jas. Tyrrell's Gen. Hist. of Eng. vol. 3, fol. 1704, end of reign of Ed. 3.

[3] View of the state of Europe during the middle ages, by H. Hallam. Vol. 3, p. 252.

on the evidence even of those of high repute; my inquiry extended to the works of many others, the detail of which would, however, become tedious, and would not in any way affect the view taken in this work of the origin of the office and title of the Justice of the Peace. There is, however, a work deserving a brief notice, that has contributed to spread the erroneous opinions of other writers, and has added to the confusion of terms and facts already apparent in previous histories namely, Rees's Encyclopedia.[1] The writer states, "the origin of justices of the peace is referred to the 4 Ed. 3," and that "they were first called conservators or wardens of the peace;" then adds, "afterwards the 34 Ed. 3, gave them the power to try felonies, and then they acquired the appellation of justices!" Other authorities more immediately connected with the law must now be brought under consideration.

Burn's Justice of the Peace,[2] by its extensive circulation, demands the first place in this review of authorities; as a work of reference, when used

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[1] Ed. 1819; article, Justices of the Peace. The Penny Encyclopedia has some of the best written articles upon all the subjects connected with this inquiry.

[2] Ed. 1837, by J. & T. Chitty, in 6 vols.

with great caution, it is valuable, but without the exercise of that caution it is worse than useless. In this work, the old story about conservators, keepers, and justices of the peace, and constables, is repeated, leaving a doubt upon the reader's mind whether the original author, or its subsequent editors, ever entertained a single clear idea upon these subjects. As this celebrated book may be supposed to be in the hands of every one who is concerned in the administration of justice as a magistrate, and who may feel sufficient interest in his important office to induce him to honour these pages with a perusal, no extracts will be made by way of showing the general history therein given of justices of the peace. But it is impossible for me to withhold my strong opinion, established upon experience, that the justice of the peace or magistrate who shall trust alone to the scraps of the statutes and cases cited in that book, either touching matter of history or points of law, without verifying them by a reference to the authorities given and the statutes quoted, will occasionally incur the risk of placing himself in peril of the law, and may, upon *after* inquiry, discover that instead of acting up to his honest intention of administering the law of peace,

he has "*inflicted* justice" upon the suitors of his court.[1] And let honourable men beware that if the statutes to which any reference is made be translations, it will be equally hazardous not to consult them in their original language. Thus it will be the safest course to carry out the just principle laid down by Lord Coke, "*optima statuti interpretatrix est (omnibus particulis ejusdem inspectis) ipsum statutum*,"[2] by applying it to the statute in its original language.

A work by W. Prynne,[3] from which much information was expected, led only to great disappointment from the frequent and promiscuous use of the terms justices, justices of peace, and justices of the peace, &c. without any apparent regard to the functions of these important officials,[4] by which it became a dead letter as to this part of my

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[1] The "remarkable case of binding over to the good behaviour," to which I have alluded in the preface, will form a singular illustration of the danger to which persons are exposed by trusting to a scrap of the statute 34 Ed. 3, c. 1, instead of consulting the whole statute.

[2] This passage has been placed in Burn's Justice of the Peace, vol. 5, p. 864.

[3] An Abridgment of the Records in the Tower of London, as collected by Sir Robert Cotton, kt. and bart. Fol. 1689.

[4] Ibid. under the title Judges, in the index, a vast number of references will be found upon this subject.

inquiry, and it is mentioned in this place merely in illustration of the same loose style of broad assertion among lawyers, that appears to be also the besetting sin of many historians. With respect to some of those other opinions so frequently quoted in Burn's Justice of the Peace as to blacken almost every page with many extracts, nothing more need be said of them than the following passage from the report of the learned commissioners on the criminal law:[1]—"Many of the ancient writers, as, for example, Bracton, Lambard, Staundeforde, Dalton, Pulton, Compton, Fitzherbert, and Broke, *are not in general use with the profession*;" with these names the readers of Burn's Justice must be familiar, and the learned commissioners doubtless could have given valid reasons for that neglect with which these heroes of Burn's Justice are treated by the profession. Hitherto it has been the fashion of some, and, one might conjecture, the duty of others to venerate and admire those ancient writers, forming, as they are here grouped, a species of constellation in the inky way; but we may apply

[1] First report from H. M. commissioners on criminal law, p. 2.

to them the same caustic criticism which Voltaire has bestowed upon the odes of Pindar :—

> Sors du tombeau, divin Pindare,
> Toi qui célébras autrefois
> Les chevaux de quelques bourgeois,
> Ou de Corinthe ou de Mégare :
> Toi qui possédas le talent
> De parler beaucoup sans rien dire :
> Toi qui modules savamment
> Des vers qui personne n'entend,
> Mais qu'il faut toujours qu'on admire.
>
> VOLTAIRE. Ode XV.—*Sur le Carrousel de l'Impératrice de Russie.*

If therefore the opinions of these "my wise masters learned in the law" appear to be treated in these pages somewhat irreverently, my apology is to be found in the words of Sir M. Foster,[1] since they apply to this investigation of historical facts as strongly as to his principles of law; he says, "I have in the prosecution of these subjects endeavoured rather to ground myself upon principles of law and sound policy" (or, with me, upon the historical truths of authentic records) "than on the bare authority of former writers, who will frequently be found contradicting each other, and *sometimes themselves.*" Every magistrate should read with profound attention the able and masterly reports of the learned commissioners, for

[1] Ibid. Appendix, p. 53.

they not only have the ability to treat their difficult and complicated subject with intelligence, but they also possess that rare moral courage which enables them fearlessly to speak the truth.

There is, however, an authority not to be passed over with indifference, namely, Lord Coke's; but his opinions must also be received with considerable circumspection; the causes which authorize this caution on my part will be fully given in the appendix, when treating on the defects of our statute book, because in those defects *perhaps* may be found an apology for that which *appears* to be, in this great man, a most serious failing, namely, a very inadequate knowledge of the original language of those statutes upon which he has been bold enough to write his celebrated institutes.

That some reason may be apparent upon the face of these pages for treating with indifference some of the oft quoted authorities in Burn's Justice, a brief notice of the opinions of Fitzherbert and Lambard will now be given; and also an extract or two made from that learned work, Spelman's Glossary. And, first of all, Spelman's treatment of this question is instructive, since with all his learning he has, in this particular instance, given way to the opinion of Lambard without question-

ing the authority, and writes thus, that justices of the peace, "gardiani et custodes pacis tum adhuc appellati," and denies that they took their origin under William the Conqueror, "ut tradit Polydorus Vergilius." And yet, in the article Justiciarius, he shows that all the leading features of our whole system of administration of justice must have taken their rise in Italy, from whence they were derived, and were ultimately established in England by the Normans. His account is as follows:—"Judex ceu administrator justiciæ, sed in foro plerumque seculari delata sunt ad Anglos vocabula sub Ed. confessore, *vel potius* Gulielmo I." [1] And further, he adds, "that those now called justices or judges, said to be in the time of Alfred, were then the vicecomites and vicedomini, and that these justices were by the Saxons called aldermen," and herein we find great confusion, arising entirely out of our habit of giving modern names to things, instead of retaining their ancient appellation; had the proper name been preserved, the true character and the exact nature of titles and offices would have been handed down to modern times. Polydor Vergil [2] merely states in broad terms that William the Conqueror

[1] Spelman Gloss. p. 329. [2] Ang. Hist. lib. xiv.

first established the English justiciary, but pretends not to say that justices of the peace were instituted by that monarch. And any one but slightly acquainted with the jurisprudence of feudal times would be disposed to agree with this chatty and diffuse writer. Though it is well known that the more polished feudal system of administering justice was in England engrafted upon the Saxon and Danish stocks, by William the Conqueror. This opinion is frequently to be met with in historians, but it must be considered that the laws, whether called Danish, Saxon, or Norman, evidently had one common origin. The Saxon and the Danish laws had not received that high degree of polish with us in the Conqueror's time; or, in other words, civilization had not reached that state of refinement amongst the northern nations as it had in Italy and France, even in the time of our Alfred the Great. But the original principles from which all the laws of Europe sprang received various modifications as they were adopted and carried out into practical administration by the several nations that received them. Something similar to this, but more learnedly expressed, has been written in Butler's preface to the 13th edit. of Coke's 1st Institutes, wherein he says, "It is

allowed, that the feudal policy of the different countries of Europe is derived from the same origin; that there is a marked similitude in their principal institutions, and a singular uniformity in the history of their rise, perfection, decline, and fall. But the more we go from a view of their general constitutions and governments to a view of their laws and customs, the less their similitude and uniformity are discoverable." But beyond all doubt the laws of the feudal governments have an origin more remote than that to which the feudal system itself is generally ascribed. The whole of Mr. Butler's learned preface is singularly interesting, and the author of this little book laments, he cannot give up the time which such an abstruse subject as the history and origin of British jurisprudence requires for its elucidation, for beyond all doubt our jurisprudence is drawn from every known source of legislation. And may I add, without the charge of presumption, that, though I agree generally with Mr. Butler in his defence of Lyttleton's law, which, as far as can be judged of it from Lord Coke's translation, might have been the recognized law of tenures in the 15th century in our own country, yet I find great difficulty in admitting all he has said in commendation of

Lyttleton, or of Sir Ed. Coke's Commentaries. Sir Edward was not a divinity, nor are all his observers inferior animals, yet something like this is conveyed in the following sentence:—"Yet it should not be forgot, that the uncommon depth of his learning, and acuteness of his mind, might enable him to discover connections and consequences which escape a common observer."—See Butler's preface, p. 15 and 21.

Lyttleton wrote the law of and for England, and therefore his account of feudal tenures, &c., may differ very materially from the histories given by writers in and for other countries, without incurring the charge of ignorance of the laws; though his ignorance of the language in which those laws were for the most part written, in England at least, renders the value of Lyttleton's work very questionable. The eloquent Guizot, in his General History of Civilization in Europe, has given a rapid but philosophical sketch of the introduction of the laws of the various orders of Saxons and Goths into France, Italy, Spain, and England, from which some of the causes of the great variety in the detail of feudal tenures may be easily deduced.[1]

[1] See Tom. 1, leçons 3 & 4, 4th edit. p. 67, and following. Paris, 1840.

Some idea of the origin and functions of the "one lord" named in the 34 Ed. 3, c. 1, may be gained from the learned glossarist,[1] who writes "Hinc etiam in more fuit sub illis seculis, ut qui à latere regis ad remotam provinciam gubernandam mitteretur, non tam Præses et Prorex (vulgo Viceroye) quam justiciarius illius provinciæ, nuncupatus sit,[1] 'Dicevansi anticamente (inquit Scipio Ammiratus) ancor Giustiziarii delle Provincie quelli che hoggi governatores di provincie & piu volgarmente vicere di provincie son detti.'" It is highly probable that this custom of the continental governments gave rise to or suggested similar appointments by our Edward, and it has been shown,[2] that the "one lord," named in 34 Ed. 3, c. 1, could not have been either lord lieutenant or *custos rotulorum*.

If Lambard be consulted,[3] no authority or evidence of any kind is adduced by him to prove that justices of the peace were originally the keepers of the peace: and he positively denies[4] that any statute prior to the 34 Ed. 3, c. 1, relates to justices of the peace, and then passes on to the 36

[1] Spel. Gloss. p. 333, 2nd col.

[2] Ante, p. 19, and following.

[3] Eirenarcha, or the office of Justice of the Peace, 8vo. Lond. 1588.

[4] Ibid. p. 25.

Ed. 3, thus contradicting all the other authorities named who have assigned previous statutes of this reign in proof of their contrary opinion, and passing over the statutes of labourers in silence. Lambard quotes Fitzherbert,[1] who also merely affirms "that before the statutes which ordained justices of the peace, the king used to make conservators of the peace by his commission," in those counties and places where he thought best to keep his peace.

The people, says Lambard, had the right to elect the conservators, but it was taken from them by the 1 Ed. 3, c. 16; and by this it is clear that constables are not meant, since they are still elected by the people:[2] and thus Lambard, on the authority of Fitzherbert, leaves it to be inferred that the *conservatores* or *custodes pacis* were displaced

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[1] Ibid. p. 24. Fitz. p. 171.

[2] Could any confidence be placed in this construction of Lambard, this act might be supposed to present a parallel decree to that of Charlemagne, by which he put down those public meetings of the Saxons which were held for the purposes of the admistration of justice. And also he forbade the wearing of arms, or "going armed," in courts of justice, a prohibition decreed by the 2 Ed. 3, c. 3. For a valuable commentary upon these decrees of Charlemagne, see Guizot's Essais sur l'Histoire de France, p. 268-9. This work of M. Guizot forms a useful introduction to the history of our jurisprudence, as found in the first and second volumes of Ruffhead's Statutes at Large.

by the justices of the peace, notwithstanding he denies that the 1 Ed. 3, c. 16, relates to justices of the peace.

He asserts that the conservators existed at *common law;* this common law is very apropos,—a sort of witness that can say anything and prove anything at any convenient time.

Nothing, therefore, satisfactory or conclusive can be drawn from such authorities, whose chief merit consists in making, according to Dr. Johnson, "idle assertions without proof," or in disputing the assertions of others.

With respect to the titles justices, justices of peace, and justices of the peace, though the two former mean generally such ministers of justice as are now called judges, yet from the very defective manner in which our ancient statutes have been written, it is frequently a matter of considerable difficulty, even with the most careful attention, to make out which of the two orders of justices is meant to be designated by the act. A single reading of the statute book will prove that all persons who were to be appointed, whether on ordinary, particular, temporary, or extraordinary occasions, to administer justice, with power to try malefactors, or to hear and determine complaints,

received, or were designated by, the general term justices; and sometimes they were called the king's justices. As an example of the incorrectness of the statutes, the 11 Hen. 6, c. 8, has in it these varieties:—"*les justices de la pees,*" translated, "the justices of peace;" "*touz justices du pees,*" translated, "all justices of peace;" "*& justices de pees,*" translated, "and justices of peace." Here, by reason of the expression "justices of peace in every county of England for the time being," it may be taken for granted that justices of the peace are meant according to the first expression in the original French, though a reasonable doubt may be entertained whether the same justices are meant in every part of the act.[1]

The 13 Hen. 4, c. 7, affords a similar example, but the context stating "two or three of them," allows of a more easy solution, and fixes the character of the justices. Lord Coke[2] uses the term justices of peace, and of the peace, indiscriminately; and the statutes to which he refers name justices of peace, the context showing them not to be

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[1] The modern and correct form of expression as used by the French is *justices de paix*, or *juges de paix*. And we ought to use the expression Justice of Peace, and not Justice of the Peace.

[2] 1 Inst. on Bail and Mainprize, c. 6, p. 23, fol. 1719.

other than justices of the peace, except the early statute of the 3 Ed. 1, c. 15, which mentions the king's justices only. The 13 R. 2, c. 8 and 9, first gave to the justices of the peace power to inquire of and to punish offences against the law relative to weights and measures, and is the continuation of that chapter quoted by law writers relative to the re-admission of the stewards of lords to the commission of the peace; though if this 9th chapter be taken as it stands, apart from the preceding chapters, and the subsequent chapter from which it has been very injudiciously and absurdly separated, no one can form an adequate idea of the true intent and purpose of the act, nor can it be said to whom or what judges or justices is given the power of trying or punishing the offenders.

As to the term keepers of the peace but little remains to be said in this place, the last section having treated of it very fully. But it may be as well to observe here that this term was given to certain commissioners, added to the judges, and to whom writs of *oyer* and *terminer* were issued to try offences on particular occasions, and as a general term indicating any minister of justice or person put into authority for the purpose of keep-

ing the peace, thus mayors and constables have also received that appellation. But this is far different from the supposition that a distinct class of men were put into commission forming a peculiar justiciary, under the title of keepers of the peace, to whom the term justice of the peace was subsequently given; for unless this was the case, and clearly established, the 34 Ed. 3, c. 1, can never apply to justices of the peace. And it will be immediately seen, that, as commissioners in name, they were not justices in fact, allowing the keepers to be considered under that appellation.[1]

The term wardens of the peace requires but little notice, since it is not pretended that these dignitaries ever were metamorphosed into the character, or received the title of justices of any degree. Yet they are mentioned in the 2 Ed. 3, c. 3, according to the English version, thus, "and the *wardens of the peace, within their wards*, shall have power to execute this act."[2] These are named as inferior officers *after* the constables. But had

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[1] *Custodes pacis* and *conservatores pacis* are used synonymously, but the former term has been applied to officers strictly military. See addition to this section.

[2] This Act is under the title "No man shall come armed before the justices, or go or ride armed;" but the justices named are the King's justices.

the writers in favour of the assertion that the keepers of the peace were the origin of the justices of the peace used common industry they might, on examining the original French of this Act, have discovered a cause of some embarrassment; the words are "et *gardeins de la pees deinz lour gardes* eient poair affaire execution de cest acorde;" now these words have usually been translated "keepers of the peace," but the context creates an embarrassment, and as the argument to be drawn from the whole expression might be used against their general assertion, it is by the greatest good luck in the world that their natural indolence saved them from stumbling upon an awkward and untoward expression, viz., "*keepers of the peace within their keeps.*"

It is well known that the words *gard* and *ward* are the same in sense, and that the difference in the spelling is merely the difference in the orthography between the ancient and modern french[1] style of writing; and to this day the city of London is divided into wards, over which there are wardens for the preservation of the peace. In ancient times wardens were sometimes placed

[1] See Roquefort's Gloss. de la Langue Romane, letter W.

over a whole city, as appears to have been the case at Metz, when that city was a republic, for much higher purposes than those within the jurisdiction of wardens of the present day. In the city of Metz their business was to watch over the other judges, that they did nothing contrary to the laws.[1] It will not surprise us, therefore, to find that the city of London, at the time William of Normandy made the conquest of England, was governed by an officer under the appellation of *Hansward*, or, as it is written in the original Latin poem quoted by Thierry, *ansgardus*,[2] and he probably filled the place of that officer now called the mayor, or, as formerly written, major, but pronounced as we spell it, or the *maire* of the French. This personage was employed to negociate with William for the surrender of the city of London. The derivation of this compound word is clearly German or Saxon. Hans-ward or wärt, we have the word *warder*, evidently identical with the German word *wärter*, signifying *keeper*.

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[1] Ibid. word Wardeurs.

[2] Histoire de la Conquète de l'Angleterre par les Normans, par Augustin Thierry, Paris, 1830, vol. 2, p. 407 to 414. The poem is published under the notice "Extrait d'un poeme Latin, découvert dans la Bibliotheque royal de Bruxelles, par M. Pertz, archiviste de S. M. B. au royaume de Hanovre."

The term conservators of the peace requires still less notice, since it nowhere occurs in the statute book as a title of office, nor is it to be met with at all in the two first volumes of Ruffhead's edition. If in the works of any author previous to the 9 Hen. 3, A.D. 1225, any proof of the existence of persons under the title of conservators of the peace as a distinct justiciary, could have been cited it would have been brought to light long ago; but should some industrious groper amongst the long neglected stores of musty records that still abound in our various archives, fall upon any such documentary proof, then there would yet remain the difficult task to show a direct connection between that ancient and the less antiquated title of Justice of the Peace; and with these observations, the question of conservators of the peace may be dismissed.[1]

With respect to the term "commissioners," the statute book affords us an interesting history, and a clear and definite declaration of the title and office comprehended by that term, and sets the matter so completely at rest that it will be impos-

[1] Perhaps there may be a very clear account of *conservators* in the *first book* of the common law.

sible to confound any commissioners of inquiry with the justices of the peace. An idea existed at so remote a period as the year 1344, that commissioners appointed to try offences, or to administer justice, whether attached to a commission of *oyer* and *terminer* or not, were justices; and so far was this notion carried out, that the title, and privileges too, of justices were insisted upon by such commissioners as matter of right. The 18 Ed. 3, stat. 2, c. 4, is a curious and instructive piece of history, and illustrates my statement in a remarkable manner: the statute is as follows, —"Item, that the commissions to assaie measures and weights be repealed and wholly adnulled; and that from henceforth no such commission shall go out. And that it be demanded *to* the treasurer and barons of the exchequer, *to do come before them* such commissioners, to yield account to the King, NOTWITHSTANDING THAT THEY ALLEGE THAT THEY BE JUSTICES, AND OUGHT NOT TO YIELD ACCOUNT. And if any will upon them complain, he shall be heard, and thereupon writs shall be made to the sheriff to make proclamation, that they which will complain upon such commissioners shall come to the exchequer, and there

to complain, and amends shall be to them made." [1] No lengthy comment is required upon this plain speaking statute; the question is settled, and finally puts the commissioners out of the argument, and further proves that justices by courtesy are not to be taken either as justices *de facto* or *de jure*.

This short Act is also of importance upon another point of history strictly connected with my subject, for it is the first Act in the statute book in which the term "commissioners" appears in the original language of the law. This term, indeed, is made use of in the translation of 51 Hen. 3, stat. 5, nearly a century before; but then the word is used in error, as the original term is "*enquerrours.*" The statutes of the reigns of Ed. 1 and 3, are calculated to afford a source of error and great confusion of terms and ideas, unless they are carefully examined, and the translation compared word by word with the original, for the general term justices is frequently used, and the term commissioners but rarely occurs; to these circumstances, together with the common usage,

[1] This statute shows in its translation the extraordinary style adopted by the translators, unless indeed the translations may be attributed to chance. But it may be a question whether the translator had any grammatical knowledge of either of the two languages in which the statute now appears.

is to be attributed the assertion by law writers and historians, that keepers of the peace originated the justices, since keepers were evidently commissioners and acted as justices also for a time and both being appointed by commission might come under the same general title of commissioners. But this Act illustrates at that time a fact which also occurs in the present day, that commissioners, though appointed to settle those matters which subsequently were placed under justices of the peace for adjudication, were not in any sense to be considered as justices.

Of the titles and offices of seneschal, marshal, constable and bailiff, little can be gathered from the statutes; the reader must therefore be referred to other sources of information; but to enter into the consideration of these officers and ministers of justice, either touching their early splendour and egregious power, or their present comparative insignificance, would be but the commencement of another volume, and its pages would greatly surpass in number those of the present work.[1]

[1] See 14 ème leçon. p. 148, in Guizot's 4th volume of his Histoire de la Civilisation en France, for an interesting account of the administration of justice by seneschals and bailiffs under St. Louis.

The constable, (high constable, but not *lord* high constable,[1]) is said by Blackstone[2] to have been first *appointed* by the Statute of Wynton; and a note (38, p. 355) in Hovenden's edit., sets forth "that this is the earliest statute in which constables are named." But constables are named in the 3 Ed. 1, c. 15, as having "fee for keeping of prisons;" and he is to "lose his fee and office for ever" if he "let any go at large by surety, that is not replevisable." Therefore the Statute of Wynton is not the first that makes mention of the constable as a peace officer of a humble class. And in the 9 Hen. 3, c. 17, we find the constable is mentioned after the sheriff, forbidding them to hold pleas of the crown. And in 9 Hen. 3, c. 19 and 20, the word constable appears. But of these it will be said, that they are not the high constable, as of the hundred in our times. The constables named in all these statutes are probably constables of castles, and as "every castle containeth a mannor" (Coke's 2nd Inst.) so probably the constable of the manor originally became the constable of the hundred; and naturally so if the

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[1] The lord high constable, and marshal are recognised by the 8 R. 2, c. 5, in the year 1384, as well as in other Acts.

[2] Hovenden's Edit. of Blackstone, vol. i., p. 355.

manor and hundred were of equal extent. The whole is conjectural, since nothing is more difficult than to get at the origin of the various grades of constables, and their particular power and authority. But constables of higher degree are well understood, though their powers are not at all times easily tobe determined.[1]

The petty constable of our day is a dangerous sort of animal, according to Blackstone,[2] having a vast deal of law on his side, but not one single rule of conduct is ever given to him; "they are armed," says Blackstone, "with very large powers of arresting and imprisoning, of breaking open houses, and the like; of the extent of which powers, considering what manner of men are for the most part put into these offices, it is perhaps very well that they are generally kept in ignorance." To this is added a note by Mr. Christian, of singular importance in the present day, and a good argument in favour of the new constabulary force bill. "If the powers of constables are dangerous they ought to be curtailed by the legislature; but surely every officer ought to know

[1] See the long note on the article "Marshal and Constable," in Butler's edit. of Coke's Inst. vol. i., 1832.

[2] Hovenden's Edit. of Blackstone, vol. i., p. 356.

the extent of his duty and authority." At present all is vague and uncertain, but the new Constabulary Force Act puts an end to this uncertainty with respect to the police.

Of the nature of the seneschal, however, a few words from Spelman[1] must be given in this place; he says, "E dictis animadverteris priscum Angliæ justiciarium, à prisco Normanniæ senescallo, *nomine* potius quam in *munere* discrepasse."

The reader will consult the following works at the parts here indicated with great advantage, touching the contents of the whole of this section; —Spelman's Gloss.—Diatriba de constabularius, p. 145; ibid. de Dapifero, p. 163, and at p. 336 and 331; ibid. article Bailus, Bajulus and Balivus; also Ducange, Gloss. on the same words and titles mentioned at the head of this section; and more particularly and advantageously, the celebrated work, Muratori Dissertazzioni sopra la Antichità Italiane, 3 Tom. Monac. 1751, article, Giudici minori, and others, in which it will be found that the major domo was a species of "factotum," even as far back as the eighth century.

Some may affect to smile at the recommendation

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[1] 2 Gloss. p. 333.

of the Penny Cyclopedia; but the articles in that justly popular work on the subjects of bailiff, constable, justiciary, leet, juries, &c., may be read with great advantage by those who have not the opportunity of obtaining a reference to, or are unable to read the original works already cited. Some of those articles are evidently written by men of great learning and intelligence; their names, I understand, have been made public, but I know not where or when.

And those justices who, even as magistrates, may be classed amongst the happy few in our hive of industry, commonly called Great Britain, to whom the enviable distinction of the "far niente" may be given[1], must be well acquainted with the powers and duties of the seneschal, both of the olden and more recent times, from the *Novelle Italiane* and the poets.

A vast mass of testimony from the works of others need not be adduced in this place in order to convince an unprejudiced mind that the origin of the Justice of the Peace lies in the seneschal and bailiff of the *curia domini*—those courts in which

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[1] It is not intended that the term "far niente" should have the same meaning as the English word "drone."

the justices of the peace first acted.[1] For if we consult Loyseau's celebrated treatise on "des seigeuries" and his "Cinq livres des offices," it will therein be found that the administration of justice was always attached to the fief; the nobles held the domain subject to the duties of a judge in the administration of justice, as well as to the duties of a general and vassal of the crown, in commanding and furnishing troops for the King's service. The bailiff, or seneschal, of the vassal lord was the administrator, or the acting magistrate, as the bailiff or seneschal set over provinces by the authority of the monarch was the minister of justice acting for and in the name of the King.[2]

Spelman says, p. 331, "Sic enim Scipio Ammiratus de magno Justitiario Regni Neapolitani Edunque il gran Giustiziere colui il quale ha il supremo luogo di esercitar Giustizia cose civile, come criminale in tutto il reame. Et inferius: Questi Giustizia non sola della Giustiziarii, ma

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[1] This may be inferred also from that passage quoted by Guizot in his note 2, p. 269, (before cited, p. 78), as follows:—"Si vassus noster justitias non fuerit, tunc et comes et missus ad ipsius *casam sedeant*, et de suo vivant quousque justitiam faciat." *Cap. Car. Mag.*"

[2] See also Guizot's Histoire de la Civilisation en France. Tom. 4, leçon 10, p. 170, &c.

per que à me pare da tante, et cose diverse scrittare haver raccolto, s'impacciavano ancor delle entrate, et rendite reali; et quelle riscuotevano, et pagavano à ministri Regii, ò in altri bisogne scondo le ordine, & il comandamente de i Re, &c. &c."

Hallam shows us that bailiffs acted as judges: —"But even where the bailiff acted as judge," &c.[1]; and at p. 283, vol. i., he says, "every barony as it became reunited to the crown, was subjected to the jurisdiction of one of these officers, and took the name of a bailliage, or a seneschaussée; the former named prevailed in the northern, the latter in the southern provinces." Hence we may be supposed to have obtained our bailiwick from the north of France or from the Norman States.

This system of administering justice is also named by Biret[2], who writes, "Mais ce ne fut pas seulement au Chatelet de Paris que l'on vit une institution analogue a nos *justices de paix*; il existait aussi dans les *bailliages* et *sénéschaussées* des juges speciaux qui décidaient, à des audiences particuliéres, sans formalités ni ministère

[1] Hallam's Middle Ages, vol. i., p. 277.

[2] Recueil général et raisonné des compétences attributions & jurisprudence des justices de paix, &c. Vol i., p. 6.—Paris, 1804.

de procureur, toutes les causes purement personelles, non procédants de contracts sous le scel royal, et donc la valeur n'excédait pas 40 fr."

Thierry in his history of the conquest of England by the Normans,[1] gives a short passage in illustration of the introduction of these titles into France by her Germanic conquerors :—"La Gaule tendit à se séparer de la Germanie, et l' Italie à s' isoler de toutes les deux. Chacune de ses grandes masses d'hommes, en s'ébranlant entraina dans sa cause la portion du peuple conquérant qui habitait au milieu d'elle, comme dominatrice du sol, et avec des titres de puissance et d'honneur, soit latins soit germaniques." Upon this passage there is a note, giving these titles of power and honour ;—"Duces, comites, judices, missi, præfecti, præpositi ; grafen, tungrafen, mark-grafen, land-grafen, herizogen, skepen, sens-skalken, maen-skalken,[2] &c. ;" these passages relate to the early part of the ninth cen-

[1] Vol. i., p. 160-1, and note.

[2] Maen-skalken is the word which the Italians have taken for their term *maniscalco* ; whilst the English and French adopt the form mähre-schalk for their terms maréschal or maréchal, and marshal ; schalk, meaning a servant, and not from schalc, as Coke has it (in his first Inst., 74 a.) meaning "a governor or master." This word is used like most of the ancient names of office in many senses, and the word given in illustration, by Lord Coke in

tury, an. 814. And when speaking of the first Earl of Chester, or *Comte de Chester*, he relates an interesting story of the "five brothers,"[1] which places the origin and powers of these several titles in a clear point of view, and shows the manner of their introduction into England. It is perfectly undeniable that the Normans divided our country amongst themselves, and originated in Great Britain all those titles of which the constable and the marshal still exist in the present day among our peace officers, as well as the earl marshal of higher state. But the term *conservators* of the peace is no where mentioned, either by Thierry or Guizot, even when describing the civil institutions of the Saxons.

Upon all the foregoing considerations and evidence, it may be taken as fully established that justices of the peace, properly so called, were not originated, continued, empowered, directed, limited, or in any way bound by or connected with

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the same passage, of its signification in the time before the conquest, is itself of German or Saxon origin, for *heretoches*, notwithstanding its Latin disguise, has its roots in *heer*, a host or army, and *doken* to roll or bring together; hence to marshal one's forces, is to bring them together in order. I cannot discover where or when the word *schalc* meant "*governor*," as Lord Coke has it.

[1] Thierry, vol. ii., p. 120 to 123.

the statute of the 34 Ed. 3, c. 1, or any part of that chapter, and that at the time the title *keepers* of the peace was first, or subsequently used, the idea of such permanent justices of the peace as county justices now are, had never been entertained, or acted upon, or intended by the institution of such keepers of the peace; nor could such a system of police have been contemplated, until the first statute or ordinance relative to labourers in the twenty-third of the same reign, and most probably not for some years afterwards; though the design of taking the administration of justice out of the hands of the vassals of the crown might have been intended from the first.

But when the constant and unremitting attention of justices became necessary for enforcing the new regulation of the wages of labourers, and the suppression of vagrancy, and for controlling the price of provisions, then the four quarterly sessions of the peace were instituted, and doubtless a justiciary of resident magistrates was created for those very purposes, as the only effectual means of carrying out the full powers of these new laws, and checking the rebellious disposition of the lower orders.

These sessions, as has been shown, were insti-

tuted by the 25 Ed. 3, c. 7, and as they were to be holden in all counties throughout England at one particular period of each quarter of the year, it was manifestly impossible that the judges of the land could act at such sessions; and thus the justices of *eyre* were, even with the aid of numerous commissions, incompetent to the task of administering the law according to these two statutes of labourers, the 23 and 25 Ed. 3. None but a permanent and resident justiciary was equal to the execution of such arduous and constant exertion, as the due performance of the multifarious duties required by these statutes. In towns the usual municipal authorities were empowered to administer these laws; but as they comprehended the working classes and vast majority of the population of all England, it became manifest that some new authorities were necessary to carry out laws of such importance, comprehending so extensive a jurisdiction over a thinly peopled country.

There is an important fact in the history of justices of the peace in our country worthy of remark,—they were never of a popular character, that is, they were from the first appointed by the mere authority of the Crown, and not elective by

the suffrages of the people. Yet had Edward followed the original Germanic rule, they would have been chosen by the people, as were the aldermen, tithingmen, and other officers of justice. For in Spain we shall find that the justices of towns and villages were elective, and when that weak monarch John 2. (an. 1419) attempted to take away this high privilege of the municipalities, the cortes remonstrated with such vigour and effect as to oblige him to respect the ancient custom. And two centuries prior to the time of John 2, in the reign of Sancho 4, (an. 1286,) the cortes obliged that monarch to withdraw the judges and the alcaldes, whom he had appointed by his own mere authority, giving the administration of justice to the "notables" of the towns and villages.[1] But this ancient custom in Spain was probably derived rather from the Roman laws than the government of the Visigoths; illustrated by the election of the *dumviri* by the *curiales*, in the Roman municipalities.

When the national assembly of revolutionary France set up, in imitation of us, (1790,) that order of magistrates to which they gave the name

[1] Don. F. M. Mariana, Théorie des cortes, &c., par Fleury. Tom. i., liv. 4, 1re partie.

juges de paix, they were at first elective by the people; though now their appointment vests in the crown.[1] With us, in Alfred's time, a portion of the old Germanic system remained in force; but the judges were appointed, and also hanged[2] by him, with a truly despotic authority. Our municipal magistrates may still be called a popular institution, but our country magistracy emanated from the will of the crown, and always possessed an extensive jurisdiction. The mayors of towns and municipal magistrates were always of inferior rank, even in France, "Toute-foys il y a d'autres pais ou ces maires de village ont *basse justice*,"[3] and so they remain in the present day.

But where was a permanent and resident justiciary to be found in the days of Edward the third? Where were the resident country gentlemen of that age? Scarcely was there a germ of that important order of the present day, the middle classes. What therefore more natural, or more congenial to the spirit of the age, than the appointment of the seneschal and bailiff of the

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[1] Oeuvres de G. L. J. Carré. Traité du droit Français. Tom. ii, p. 175-6.

[2] Mirrour of Justices, by Andrew Horne.

[3] Loyseau, cinq livres des offices. Liv. ii. c. 2, p. 197.

lord, in his extensive franchise, to the office of Justice of the Peace? Here, in these officers, ready for the purpose, was an order of men who had for ages acted as justices within the courts of their lords throughout Europe. And the statutes show they were the first appointed for the purpose of carrying out those ordinances regarding labourers. Before these statutes were passed into a law, the jurisdiction of the seneschal and bailiff was limited to the territorial possessions, and the serfs or villaines of the lord in whose court matters of dispute within the franchise were decided; but now, under those statutes, the seneschal obtained the same authority over the whole county, though not within the strict possession of his own, or within the franchise of any other Lord. This was a vast enlargement of power granted to these officers, yet it constituted but a small portion of that jurisdiction, which in a very few years afterwards was assigned to them as justices of the peace.

The appointment of the bailiff and the seneschal of the lord, might have been very eagerly received by the vassals of the crown, as a compliment, and even solicited as an extension of their power, since it greatly increased the importance and jurisdiction of their subordinate officers, whilst at the same time it removed a heavy responsibility

from themselves. But, in reality, this new creation of justices was a direct inroad upon the vassal's authority, cut off the high privilege of administering justice in his court, and reduced his office to a mere military service, changing the tenure of the fief.

Hume (vol. ii. p. 569) observes, "the chief obstacle to the execution of justice in those times, (Ed. 3,) was the power of the great barons, and Edward was perfectly qualified by his character and abilities, for keeping these tyrants in awe and restraining their illegal practices. This salutary purpose was accordingly the great object of his attention." It is clear, therefore, that by the institution of a new order of magistrates, and the ordinance and statutes of labourers, these "illegal practices" were most likely to be checked. This new institution was no doubt some time in preparation, as may be inferred from the numerous petitions of the commons to the crown during this reign, for the better preservation of the peace of the country.[1] And though the granting of the bill of entails, as is observed by Hume in the 13th of Edward's reign, might have been ill-advised, as tending to secure and perpetuate the power of the

[1] See Cobbett's Parl. Hist. for Ed. 3.

barons; yet as this took place but ten years previously to the statute of labourers, it might have been as a douceur to the barons to prepare them for their real loss of power and influence over the vast commonalty. The barons lost all participation in the administration of justice both civil and criminal by this new institution, except the little that they shared with those "learned in the law," the judges in the great commissions. And as these judges were to refer all difficult cases to "the one bench or the other," at Westminster, we may take it for granted that a refractory baron and a difficult case were synonymous terms. And thus the refractory baron was worried by long litigation, or awed into obedience by the high justiciary perhaps *in aula regis*.

And if it be possible to attribute all that wisdom to the acts of Edward 3, that has entitled him, in the estimation of Blackstone,[1] to the name of the English Justinian, I should certainly set forth the institution, or rather the introduction into our country of the Justice of the Peace, as one of his greatest acts, the result of a profound and well meditated policy. But this is impossible, seeing the absurd and destructive laws for the adminis-

[1] Bk. iv. c. 33, p. 425.

tration of which these justices were appointed.[1] Their appointment, however, secured to the crown the entire administration of justice, civil and criminal, and by putting an end to those vast abuses and cruelties practised in the ancient courts of the nobles,[2] granted a mighty boon to the suffering people, and finally led to the establishment of a comparatively more enlightened justice, based upon fixed and intelligible principles.

Thus, then, considering the gradual progress of the "Justices to be assigned," for the purpose of carrying into effect the statute of labourers, who when assigned, were known by the title of "Justices of Labourers," and who in the eleventh year after their appointment were called "justices of the peace and labourers;" and that ever after the thirteenth year from their first nomination

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[1] Let the reader consult the Gentoo code of laws, touching the wages and remuneration of labourers, and he will have cause to smile at the affectation that places our Edward III. as a Justinian, p. 164. But at p. 300, there is a rule that seems to be of the same stamp as the statute of labourers, with respect to a price upon articles, as fixed by the magistrate, and also the rate of wages; yet upon a careful consideration, the rule is more equitable and less injurious than our statutes, since it is referrible to general principles. This Gentoo code was framed many centuries before England was recognized in Europe as a nation. See the code published by Nathaniel Brassey, Halhed, under the auspices of Warren Hastings. Lond. 1776.

[2] Loyseau has exposed the arbitrary character and the abuses of hese courts.

to the present hour, were known by the more distinguished and honourable title of justices of the peace only;—comparing their duration and this gradual progression in title and in power with the occasional appointment and dissolution of those commissions of the "keepers of the peace;"—comparing the constantly increasing power of the justices of labourers, with the total absence of delegation of fresh powers to the keepers of the peace in any other matter or thing than is mentioned in the occasional Acts by which they received their temporary appointment;—comparing the extraordinary circumstance of the continuance of the justices of the peace and labourers for several centuries, with the total absence of any mention of the keepers of the peace after the 34th of Edward the third; and bearing in mind the important facts, that even the justices of the peace during forty years after they acquired that high title, had no other jurisdiction or business than that regarding labourers and the statutes of labourers, and also, that in the last Act in which the keepers of the peace were named and reconstituted for a time, these justices of labourers were recognised, and received an enlargement of their powers; considering all these

facts and circumstances, is it not just and reasonable to conclude, that the keepers of the peace constituted a commission sometimes contemporaneous with, and at all times utterly distinct from that of the justices of labourers, or the justices of the peace and labourers, or the justices of the peace? And because the keepers of the peace and the justices of the peace were contemporaneous, acting under distinct commissions, it is an obvious error to say that the justices of the peace were originally called keepers of the peace, or that they originated in the keepers of the peace, or that the same statutes that gave power to the one gave also the same power to the other: they were undoubtedly from the earliest period perfectly distinct classes. Such are the conclusions to which an examination into those statutes cited, by law writers, in proof of their relation to the origin of the Justice of the Peace, has produced; conclusions supported and rendered the more certain and correct, by an extensive search into that storehouse of historical truths, the Statute Book of the Realm; and confirmed by the evidence of a vast mass of writers of every class of history.

Yet I suspect there are many who will exclaim, with an expression of superlative contempt, "The

Statute Book ! of what avail are these ancient statutes against the decisions upon them by such 'revered sages' as Fitzherbert, Lambard, lords Coke, Hale, and Holt ? Such high authorities supersede all proof, and anything to the contrary is inadmissible." But notwithstanding the possibility of such observations, I think sufficient evidence has been adduced in these pages to prove that the 34 Ed. 3, c. 1, does not and ought not to give power to justices of the peace.

ADDITIONAL OBSERVATIONS ON CERTAIN "CUSTODES PACIS, OR CONSERVATORES PACIS."

I must now entreat the reader's attention to some observations upon an important passage in M. Guizot's volume of "*Essais sur l'Histoire de France,*" which treats so largely also on England.[1] My reasons for considering the statement of this learned and excellent author, apart from the various subjects touched upon in this third section of my work are, that I see, or think I find in it an explanation of the nature and powers of the ancient CONSERVATORES PACIS, named in the writings of our law historians, and because I feel

[1] p. 451.

assured that remarks, though they may be very cursory, made by such an eminent writer as Guizot, are worthy of our most serious attention.

M. Guizot, after stating the event by which the Earl of Leicester obtained once more complete dominion over the King and the whole kingdom, cites an ordinance, issued in reality by that Earl though in the name of the King, commanding four knights to be chosen in every county to assist at a parliament assembled in June in that year (1264); and a portion only of that ordinance is given for the purpose of proving the statement touching the summoning of the knights of the shire. Guizot next proceeds to speak of the haughty and despotic conduct of Leicester, stating that "he established throughout the kingdom, under the name of *Conservators of the Peace*, officers invested with the most arbitrary powers."[1] On this passage a note is made, in which a translation into french appears of another clause of the royal ordinance in proof of the assertion touching conservators of the peace, and the following important observation is added to the note, but without any authority being cited to support it,—"a

[1] "Il l'exerça de la façon la plus despotique et la plus hautaine, établit dans tout le royaume, *sous le nom de conservateurs de la paix*, des officiers investis du pouvoir le plus arbitraire."

tutelary magistracy, that of the justices of the peace had its origin in this institution, which was at first a mere instrument of party." [2] We are referred to RYMER's *Acta Publica*, vol. 1, p. 792, for the royal ordinance, and as the whole of it should be read, it will be found as follows :—

"DE CUSTODIBUS PACIS IN SINGULIS COMITATIBUS CONSTITUTIS. AN. 1264, 48 H. 3.

"Rex Adæ de Novo Mercato salutem. Cum jam, sedata turbatione, nuper habita in Regno nostro, *pax inter nos* et *Barones nostros* divinâ cooperante gratiâ, ordinata sit et firmata ; ac ad *pacem illam* per totum Regnum nostrum inviolabiliter observandam, de Consilio et Assensu Baronum nostrorum, provisum sit, quod in singulis comitatibus nostris, per Angliam, ad tuitionem & securitatem partium illarum, CUSTODES PACIS nostræ constituantur, *donec* per nos et Barones nostros de statu Regni nostri *aliter fuerit ordinatum ;* cumque nos, de vestra fidelitate simul et industria fiduciam gerentes, vos, de consilio dictorum Baronum nostrorum, custodem nostrum assignaverimus in comitatu Lincolniæ quamdiu nobis placuerit ;"

[2] "Une magistrature tutélaire, celle des juges de paix, a pris son origine dans cette institution qui ne fut d'abord qu'un instrument de parti."—*M. Guizot's note, foot of p.* 451.

"Vobis mandamus, in fide, qua nobis tenemini, firmiter injungentes, quatinus, custodiæ *pacis nostræ* ibidem, et hiis, quæ ad conservationem pacis nostræ pertinent, diligenter intendatis ut prædictum est.

" Firmiter et publicè per totum comitatum prædictum inhibentes, ex parte nostra, ne quis, subpœna exhæredationis, et periculo vitæ et membrorum, super aliquem currat, nec aliquem deprædetur, homicidia vel incendia, roberias, toltas, seu alia hujusmodi perpetret enormia, nec cuiquam dampnum aliquod inferat, contra pacem nostram, nec etiam de cætero arma portet in Regno nostro, sine licentia nostrâ et mandato nostro speciali:

" Et, si quos hujusmodi malefactores, et pacis nostræ perturbatores, vel etiam, ut prædictum est arma portantes inveneritis, *eos sine dilatione arestari et salvo custodiri faciatis, donec aliud inde præceperimus.*

" Et *ad hoc,* si necesse fuerit, totum posse dicti Comitatus, cum toto posse Comitatuum adjacentium, vobiscum assumatis, custodibus ipsorum comitatuum ad consimilia, cum opus fuerit, viriliter auxiliantes :

" Et si forte ipsos malefactores evadere contingat, quod nulla ratione vellemus, tunc de nominibus eorum nobis constare faciatis, ut quod justum fuerit de ipsis fieri faciamus.

"Et quia, instanti parliamento nostro, de negotiis nostris et Regni nostri cum Prælatis, Magnatibus, et aliis fidelibus nostris tractare necessario nos oportebit, Vobis mandamus quatinus quatuor de legalioribus et discretioribus militibus dicti comitatûs, per assensum ejusdem comitatûs ad hoc electos, ad nos pro toto comitatu illo mittatis;

"Ita quod sint ad nos London, in Octabis instantis Festi Sancti Trinitatis ad ultimum, nobiscum tractaturi de negotiis prædictis; vos autem in hiis omnibus exequendis tam fideliter et diligenter vos habeatis, ne per negligentiam vestri ad vos et vestra graviter capere debeamus.

"Teste Rege apud sanctum Paulum London quarto die Junii." To this ordinance a list of about twenty-seven nobles is given to whom these extraordinary powers were entrusted.

A single reading of this important document will convince any one that it does not contain one word referrible to ministers of justice of any kind, known or unknown to the laws of England; and it must occur to every one, on a moment's reflection, that if those ancient conservators of the peace, to whom our old law writers have attributed the origin of the Justice of the Peace, possessed such peculiar, vast, and arbitrary powers as are given to the *custodes pacis* named in this ordinance of Hen. 3,

then an extension of meaning has been given to the term "to keep the peace," such as no other than our law historians would have ventured to pronounce.

Look to the first clause in this ordinance; it distinctly sets forth, that the king has concluded *a peace* between himself and his barons, and for the sake of observing *that peace, (illam pacem,)* certain nobles are invested with extraordinary powers throughout all England.

Here the word *peace* is limited to that specific state of things contradistinguished from a state of war; and the peace named refers to that particular peace just concluded between the king and his barons. And the whole ordinance, as well as the history of the time, shows that the powers of these conservators, or custodes of the peace, appertained directly to military, but incidentally to civil government, and not at all to the administration of justice.

Beyond all doubt, numerous bands of armed men had taken advantage of the great war between the king and his nobles, to set up a guerrilla of their own; and it requires no great stretch of imagination to attribute to such lawless and uncontrolled soldiery the perpetration of every hor-

rible crime upon the peaceable inhabitants.[1] But there is another and more important consideration —the all-grasping power of Leicester; and this ordinance was an artfully-contrived means of putting down those other nobles whose armed retainers, he was well assured, would be employed to obstruct his ambitious designs. And to his apprehensions, the reason for the interdiction to bear arms without the licence and special command of the king, may be attributed. But the powers of these *custodes pacis* over the malefactors and the unlicenced bearer of arms were but to arrest them without delay, and to keep them in safe custody until further directed by the king, *eos sine dilatione arrestari, et salvo custodiri faciatis, donec aliud inde præceperimus;* and for these pretended purposes, the whole force of any county, and of adjoining counties, might, by the crafty design of Leicester, be called out and marshalled by the *custodes pacis* of his own creation.

The last clause also by which these officers are empowered to summon four knights out of every county, at that particular juncture, can only be looked upon as an extension of means adopted to accomplish his plan of domination.

[1] That banditti existed in England for more than 200 years after the conquest is well known. See also Thierry's work on the conquest of England by the Normans; 2nd vol. pp. 127 to 131.

What, therefore, does this ordinance contain which can possibly induce any one to believe there existed the remotest affinity or relationship between the powers of the ancient conservators of the peace and those of the justices of the peace?

Compare this ordinance with those of Ed. 3, already cited in section 1, and the widest difference will be at once apparent between the *custodes pacis* of Hen. 3, and the "gardeins de la pees" of Ed. 3. The guardians of the peace, by inference, were indeed like these *custodes pacis* appointed but for a time, because their reappointment from time to time necessarily followed their dismissal, which was accomplished by those frequent ordinances that declared "all commissions of new inquiry shall cease;" here, however, in this ordinance of Hen. 3, it is positively set forth, that the *custodes pacis* shall continue, until it shall be otherwise ordained, concerning the state of the kingdom, "*custodes pacis nostræ constituantur, donec per nos et barones nostros de statu Regni aliter fuerit ordinatum.*"

In the ordinance of Hen. 3, the whole, with the exception of the last clause touching the election of knights of the shire, relates to military government. In it no mention is made of joining "three or four of the most worthy in every county" with

these *custodes*. No power is given them "to chastise the malefactors according to their trespass or offences," and "to punish them according to the law and customs of the realm;" no power "to take surety and mainprise for the good behaviour;" no promise of the assistance of "some learned in the law;" no writs of *oyer* and *determiner* are to be delivered to these officers, "to try all manner of felonies;" in short, no one semblance or shadow of any judicial power or authority appears in this tyrannical ordinance, and it is neither more nor less than an edict for placing the whole kingdom under the unmitigable government of a military despotism, and Leicester was to play the despot.

If, therefore, those statutes or ordinances of Ed. 3, which gave the highest judicial powers to certain "keepers of the peace" are found to be too arbitrary in their character, or too uncongenial to the powers of the more humble office of the Justice of the Peace, how much more arbitrary and uncongenial must this ancient ordinance of Hen. 3 appear to all who will take the trouble to read, compare, and reflect upon the statutes and ordinances of those two distinct periods in our history?[1]

[1] Blackstone in his Commentaries, vol. iv, p. 413, names the *conservatores* amongst the subordinate magistrates elected by the people.

I hope, both for the sake of consistency and the more important consideration of character, that the conservators of the peace mentioned by our law historians in their historical sketches of the origin of the Justice of the Peace, were of a class far different from the *custodes pacis* of Hen. 3, and possessing powers more in unison with the laws and liberties of our Saxon ancestors, than those attributed to the mere creatures of Leicester's criminal ambition.

Upon a consideration of the whole facts, I feel warranted in concluding that M. Guizot has merely repeated the story of the origin of the *Juge de Paix* in England as he had met with it in our historical writers, both law and lay; that he could not have compared the ordinances of Henry and Edward the Third, relative to the keeping of the peace; and that he cannot be aware of the singular history of the Justice of the Peace so clearly recorded in our statute book in the time of Ed. 3. And it must be obvious to all that this arbitrary ordinance of Hen. 3 contains no evidence whatever that can in any way disturb that history of the origin of the office and title of the Justice of the Peace, which I have ventured to suggest in these pages.

APPENDIX.

APPENDIX.

The objects intended to be accomplished by this appendix were merely to state those circumstances and to make those observations, which, notwithstanding their very near relation to the principal subject, yet would have been somewhat out of place in any other part of my book, would have obstructed the general course of the argument and distracted the reader's attention by reason of their novelty and importance. In the examination of those circumstances fresh objects also came in view, and the farther my inquiries extended, the greater became the necessity of making additional observations, and thus these pages have been increased to an unexpected number. Interesting as my original subject appeared to me in relation to the powers of the Justice of the Peace, yet it must be acknowledged this interesting character has been greatly enhanced by the important historical events, and the unexpected peculiarities that my search through the first two volumes of the statute book necessarily brought into notice. Un-

willing as I am to set up my own limited information as a standard whereby to measure the intelligence of others, yet the reflection that there are perhaps some few magistrates who may derive fresh information from these pages, has enabled me to accomplish this laborious task, and to indulge in the hope that I have not laboured in vain. And I have good reason to suppose that there may be, perchance, some barristers, "learned in the law," who will not consider the time they may spend in perusing my little book as entirely thrown away and lost. To such men, as well as to those who, like myself, have found entertainment and instruction in reading works on jurisprudence and legislation, this appendix may be more particularly adapted.

The extent of my knowledge of the principal subject of this appendix, at the time I first entered upon this inquiry, was limited to that degree of information which every gentleman of liberal education might consider as fully sufficient for general purposes. History instructs us that our ancient statute laws were written partly in the Latin, but mostly in the French language; and the opinion of legislators and jurisprudists upon the great and serious inconveniences and dangers that must necessarily accrue to any people whose laws are

written in a foreign tongue, is equally known to every man, and equally felt by all those who, besides a taste for reading, enjoy in addition the faculty of reflecting upon what they read. But, as if these inconveniences and dangers were not sufficiently great, we find them incalculably increased, not only by the peculiarities incidental to an antique language, or generated by the lapse of ages, but also by the industrious labours of inefficient transcribers and ill informed translators. And I am free to confess that, until my attention was more immediately called to the statute book, for the purpose of making that inquiry which the earnest desire of conscientiously discharging the duties of the important office of justice of the peace necessarily required, I had not the slightest idea of the great and glaring defects to be found upon every page of the ancient laws of my country. Shall I be credited, when I declare, that the translations of most of our ancient statutes, as published in that edition of them which, down to the year 1810, was acknowledged to be the best,[1] and even now is most generally referred to and cited as of un-

[1] Ruffhead's.

questionable authority, are so exceedingly erroneous and defective, both as regards the matter and the manner, as to prove, beyond all possibility of doubt, that the translator was very frequently not only unacquainted with the language he affects to translate, but was also ignorant of his own native tongue, and in truth equally unskilled in the common principles of any language whatever. Yet, is this statement no exaggeration. How can we, therefore, estimate the imminent danger to the liberties of a people who are subject to laws that are suffered to remain upon their statute book in so defective and deplorable a state? With these few preliminary observations we may now enter upon the first subject of this appendix, namely—the present state and condition of our ancient statutes, and more particularly regarding their English dress. Thus to the proofs—and we need not step out of our way in search of them. Open the first volume of our statute book at any page, and in the first few lines an example may be found of some of these crying defects. I shall, therefore, take two or three instances from those statutes, or rather parts of statutes, that have necessarily been referred to in my inquiry into the origin of the office and title of the justice of the peace, and the

first example is from that celebrated statute of Winchester of the 13th Ed. 1, stat. 2, c. 6: but instead of limiting the extract to that small portion before given in p. 7, as taken from Ruffhead's edition, the whole chapter will now be cited. Here, too, I must introduce to my reader that costly and stupendous work, bearing the following imposing title:—

"*The Statutes of the Realm.* Printed by command of His Majesty King George the Third, in pursuance of an address of the House of Commons of Great Britain. From original records and authentic manuscripts." 1810. Fol.

But, notwithstanding the majesty that shines upon the face of the gorgeous page, modern times have not produced a more significant illustration of the ancient fable of the mountain in labour. That the value of the labours of those high commissioners who were empowered to produce this great work, and that "their learning, skill, and diligence"[1] may be duly appreciated, the reader is presented with a verbatim copy of this sixth chapter, in its original French, with the

[1] See the compliment paid to the commissioners in the preface of their report. Vol. 1.

translation, and notes, as they appear in the royal edition :—[1]

"Comaunde est ensement qe chescun home eit en sa mesun *armure* pur la pees garder, solum la aunciene assise ; ceo est assaver qe chescun home entre quinze annz e seisaunte soit asis e jure as armes, solum la quantite de lur terres e de lur chateus ; ceo est assaver, *a quinze liveree des terres*, e chateus de quaraunte mars (hauberg[2]), *chapel de feer*, espe, cutel e cheval ; a disz liveree de terre, e chateus de vint mars (habgeun [3]), chapel, espe, e cutel (a cent (soucheesz[4]) de terre parpoint, chapel de feer, espe e cutel [5]) ; *a quarante* (*souch* ——[6]) *de terre*, e de *plus jeques a cent souz*, espe, ark, setes e cutel ; *E qe meins ad* (*de*[7]) *quaraunte souze de terre* (seit jure *a faus gisarmes*, cutens[8]) e autres menues armes ; (9) (qi meins ad de chateus de vint mars espees cutens e autres menues armes [10]). E

[1] In the royal edition *er* is printed in a contracted form, but to avoid a useless expense these two letters are here printed at length.

[2] Hauberk—*Rot. Claus.* Hauberc.—*Rot. Scac.*

[3] Haubgeon—*Rot. Claus.*—MS. Cott. hauberc—*Rot. Scac.* ; *Lib. Horn.*

[4] Souldz—*Rot. Claus.*

[5] *Rot. Scac.* omits.

[6] Souldz.—*Rot. Claus.*

[7] Ke.—*Scot. Scac.*

[8] Seent jores a gisarmes—*Rot. Scac.*

[9] Et—*Rot. Claus.*

[10] *Rot. Scac.* Omits.

tuz les autres, qi aver pount, eient arcs (e setes hors de forestes, e dedenz forestes arcs e piles. [1]) E qe veue des armes, soit fete deus foiz par an. E en chescun hundred e fraunchise seyent eleus deus Conestables, a fere la veue des armes ; *e les Conestables avanndiz presentent devaunt les justices assignez, quant il vendrunt en pays, les defautes qil averount trovez de armeure,* e *(de suites de veilles*[2]*) e de cheminz*; E presentent ausi de (genz, qi herbigent genz estraunges [3]) en viles de *uppe laund,* pur queus il ne volent respundre. E les justices assignez en chescun parlement representent au Rey, e le Rey sur ceo en fra remedie. E bien se gardent desoremes, Viscuntes, Baillifs, de fraunchises e dehors greignurs ou maindres qi baillie (ou foresterie unt [4]) en fee ou en autre manere, qil siwent le cri ove le pays ; E solum ceo qil sunt, eient chevaus e armeure a ceo fere ; E si nul seit qi nel face, seient les defautes presentez par les Conestables as justices assignez, e puis apres par eus au Rey cum avaunt est dit. E comaunde le Rey e defend, qe feire ne marche desoremes ne soient

[1] Setis en foreste & hors de foreste—*Rot. Scac.*

[2] De sutez de villes—*Rot. Claus ; Rot. Bodl.* De sayte de viles —*Rot. Scac.* De suytes des viles—*Lib. Horn.*

[3] Gent etrange herbiges—*Rot. Scac.*

[4] Unt en foreste ou dehors, ou—*Rot. Scac.*

tenuz en cimeter, pur honur de Scinte Eglise. Donc a Wyncestre (le utisme jour Octobr[1]), le au du regne le Rey [2] Trezime."[3]

TRANSLATION OF THE ABOVE IN THE SAME, p. 97.

"And further it is commanded, That every man have in his house harness for to keep the peace after the antient assise; that is to say, every man between fifteen years of age and sixty years shall be assessed and sworn to armor according to the quantity of their lands and goods; that is, to wit, (from[4]) *fifteen pounds lands* and goods, ([5]) forty marks, an hauberke, (*a breast-plate*[6]) of *iron*, a sword, a knife, and an horse; and (from[4]) ten pound of lands and twenty marks goods, an hauberke (a breast-plate of iron [7]), a sword, and a knife; and (from[4]) five pound lands (a doublet [8]), (a breast-plate [9]) of iron, a sword, and a knife; and from forty shillings land and more,

[1] *Rot. Scac.* omits—le vintisme jour de Septembre—*Rot. Bodl.*
[2] Edward—*Rot. Scac.*; *Rot. Bodl.*
[3] Renouvele & asseale a Everwyk lan de son regne vint et oytisme—MSS. Harl. 858, 1208.
[4] For.
[5] Of
[6] Helme. (hat. MS. Tr. 1.)
[7] An helme. (hat. MS. Tr. 1.)
[8] Parpoint. MS. Tr. 1.
[9] An helme.

unto one hundred shillings of land, a sword, a bow and arrows, and a knife; and he that has less than forty shillings *yearly,* shall be sworn to (keep gis-armes [1]), knives, and other (less weapons [2]); and he that hath less than twenty marks in goods, shall have swords, knives, and other (less weapons [2]); and all other that may shall have bows and arrows out of the forest, and in the forest bows and (boults [3]); and that view of armor be made every year two times. And in every hundred and franchise two constables shall be chosen to make the view of armor; and the constables aforesaid shall present before justices assigned [4] such defaults as they (do see in the country [5]) about armor, and (of the suits of towns [6]), and of highways; and also shall present (all such as do lodge strangers *in uplandish towns* [7]) for whom they will not answer. And the justices assigned shall present (at every Parliament unto the King such defaults as they shall find [8]), and the King shall provide remedy therein. And from hence-

[1] Fause gisarmes. MS. Tr. 1.
[2] Small arms. MS. Tr. 1.
[3] Piles. MS. Tr. 1.
[4] When they shall come into the country.
[5] Shall have found.
[6] Of suits and of watches.
[7] Men that hereboureth opelond. MS. Tr. 1.
[8] The same at every parliament unto the king.

forth let sheriffs take good heed, and bailiffs (within their [1]) franchises and without, (be they higher or lower [2]), that have any bailiwick or forestry in fee or otherwise, that they shall follow the cry with the country; (and after, as they are bounden, to keep horses and armor or so to do [3]); and if there be any that do not, the defaults shall be presented by the constables to the justices assigned, and after, by them to the King, (and the King will provide remedy) as afore is said. And the King commandeth and forbiddeth, that from henceforth neither fairs nor markets be kept in church-yards for the honour of the church. Given at Winchester, the eighth of October, in the 13th year of the reign of the King."

Who can possibly read this extract from the royal volume of the statutes of the realm without astonishment? Who can possibly reflect upon this specimen of our statute book without regret? How have these great commissioners fulfilled their declaration, that "at the foot of the text on each page there are added such various readings

[1] Of.

[2] Greater or lesser.

[3] And, as they are in ability, to keep horses and armour, so to do.

N.B.—The Rawlinson Manuscripts, marked as—MS. Tr. 1.
The Harleian Manuscripts, marked as—MS. Tr. 2.

as appeared necessary to correct its errors, or to supply its deficiencies, or to reconcile any material contradiction or repugnancy between the text and the translation?" [1] Can any notes be more trivial or insignificant than those given in the above examples? And as to the various readings, it is a matter of surprise that the commissioners should have ventured to mention the fact of any variety in the numerous ancient manuscripts, seeing the small use made of them, and the little industry employed in their investigation. We are informed by them that "many palpable errors and omissions have been allowed to remain without notice in all the translations;" [2] why, therefore, with so clear an insight into such defects should the commissioners have laboured merely to hand down to succeeding ages such "palpable errors and omissions;" and, adding to the uncertainty and confusion by half attempts at the correction of some of those errors, and by the total neglect of most of the defects. It was a fact well known to these commissioners that all former editions of the statutes of the realm were unauthorised; that they were made by private individuals

[1] Preface to the Report, c. 3, sect. 1, p. 31.
[2] Ibid, c. 1, sect. 1, p. 25.

who were induced to collect and compile the various statutes by considerations of convenience or of profit; and, as a natural consequence, the number of the statutes handed down to us in those several publications was small. And it was equally well known that every page of those unauthorized books bears ample evidence of its worthlessness, and of that spirit of indifference to the importance of the subject that must have attended the several editors. But notwithstanding this well known state of things the commissioners actually copy and republish those pages, with an occasional rejection or an accidental selection, apparently haphazard, and without rule or principle. They announce in their preface, that "this collection does *not* contain *all*, but only such as have been previously published, with some *few* additions,"[1] and yet they confess, "that so great was the number of all the various rolls, that the introduction of them would form an inconvenient mass."[2] It is foreign to my purpose to venture upon any conjectures as to the loss or the gain to the present times, or future

[1] p. 33, *Introduction.*

[2] Ibid, p. 33. The inconvenience, I suspect, was not in the mass only!

ages incidental to the rejection of the "inconvenient mass," which is now mouldering to decay in our neglected archives.[1] Many there are, no doubt, who consider our laws sufficiently numerous, without raking up more from the lumber rooms of musty records; and my own experience of "the wisdom of our ancestors" enables me to offer an apology for the delicate sensibility of the commissioners, who felt the inconvenience of the additional mass. But as these highly commissioned gentlemen thought proper to set aside "the inconvenient mass," and limit their field of action to the narrow bounds of two previous volumes, there is the less excuse for the careless manner in which they have executed their diminished task. A few illustrations will satisfy the inquirer that the "Statutes of the Realm," printed by command of King George III., are as defective and as worthless as the "Statutes at Large," printed by the necessitous commands of any of his titled or untitled subjects. Now, amongst the notes to the English version of the French text of the statute of Wynton, the only one of any importance is the fourth, since it supports the translation I have

[1] See note to Hardy's Rotuli Normanniæ, preface, p. 6. For the bad state of the records which M. de Bréquigney was allowed to use, and many of which are no longer to be found.

given of that passage, relative to the character of the justices assigned[1]; but upon what principle the commissioners allowed the whole of the imperfect passage to remain with no other note than the one here given is utterly inexplicable. To make the translation intelligible is impossible, without the entire reconstruction of the sentence. The strange error of translating "*chapel de feer*" by the term "breast-plate of iron," is certainly noticed by a note, giving the word "helme," as in the Rawlinson MS. But why the old translation should have been retained in the royal edition is hard to guess at after the insertion of the first correction. These high commissioners appear to have followed the example of Blackstone, in that they have treated the errors and absurdities of their brother "apprentices," and "wise masters learned in the law," with a complaisant delicacy, acting as if it would not only be uncivil, but cruel, nay a species of *auto de fé*, to erase an error consecrated by the sanction of many ages.[2]

The manner in which the word *soudeesz* has

[1] *Supra.* Sect. 1. p. 8.

[2] In a "Dictionary of the Norman or old French language, published 1779, by Kelham of Lincoln's Inn, we find the expressions *Chapelle de ferre*, translated "a breast-plate of iron." This author has made his dictionary out of the translation of the statutes as in Ruffhead's edition.

been treated in the royal edition is certainly inexcusable. It is found thus written—*soucheesz*, and *souch* ——, and by the notes 4 and 6 *souldz*; the old translation of this word is also retained in the word "*shillings*." Now, had the commissioners followed the copy in Ruffhead's edition this word *soucheesz*, would have been written more correctly *soudeesz*. Had the commissioners borne in mind a well known fact, this word would not have been translated "*shillings*," since that coin was not known in the time of Ed. 1. To show the carelessness with which this translation has been made and now repeated in the royal edition, I need only observe upon this word *sousdeesz* very briefly:—*Sousdeesz* means wages or pay for military services, and *sousdée de terre* and *sodée de terre*, a portion of land producing a *sol* in rent; the true value of the *sol* cannot be easily ascertained; it was twelve or thirteen pence (*denier*) in the Norman times, but was neither a shilling or its equivalent, and no single English word can represent the *sousdeesz de terre*.[1] See Gloss. de la Langue Romane, by Roquefort: 1808, Paris. As

[1] I am aware that *sol* or *solidum* has been commonly translated by the word shilling, but an error does not become corrected by its universality. And the value of the *denier*, 13 of which is said to be equal to a *sol*, is uncertain, some being of gold and some of silver.

to the word *soucheesz*, when not applied to persons or to feelings, it means in land, that which was formerly forest but now cleared. But to translate it by the word "shilling" is obviously as erroneous as to translate the word "*liveres*" by the term "*pounds*" in this case; consult Roquefort. Kelham's Dictionary *is no* authority; see also on the value of money, Lord Lyttleton's History of Henry 2, vol. 1, p. 532-5. The word *fanchons* is evidently a mistake for *fauchons*; but this word, though in Ruffhead's edition, is omitted in the copy of the royal edition. I purposely confine my observations upon the inexplicable manner in which the royal edition has been got up, to a few particulars, because any lengthened detail would inevitably disgust some readers, whilst there are others who would defend the commissioners by a criticism, at once interminable and bootless. There are other passages in this chapter of the statute very objectionable, upon which the commissioners have merely given a slight and useless note; but they must be left to the observation of some curious or learned reader. It is, however, matter of astonishment that whilst the commissioners had full power to call for and examine every record throughout the country, that whilst the doors of

the archives of every college, cathedral, or chamber of the government were widely opened for them, they should have chosen as the basis of their grand collection of the statutes of the realm, Ruffhead's highly defective book. If the reader will compare their copy of this statute with the clear and beautifully written MS. of Laud, in the Bodleian Library, at Oxford, the conviction must rest on his mind that the commissioners have not thought it necessary to avail themselves of that valuable document.[1]

I must, however, refer to another example of what appears to me to be an inexcusable neglect of the commissioners in applying to one statute a translation from a very different original; and they have fallen into this strange error by merely adhering to Ruffhead's edition. By comparing the MSS. in the British Museum it will be found that the translation of the 4th Ed. 3, c. 2, as given in Ruffhead's edition, follows the copy in the Harleian MS.,[2] and appears to have been made from

[1] In the Laud MS. the word *jeqes* is written *jusques*, and *greigneurs* is written in full *graunz seigneurs*.—Bodl. Library, b. 107 and 680. The reader may find some amusement in tracing this last named word through its various forms in Roquefort's Gloss.

[2] No. 4999.

an original French copy similar to that which is found in the Cottonian MSS.[1] But the original French, as given in Ruffhead's, is taken from the rolls in the Tower of London, and contains the words "*les ditz justices,*" which are not to be found in the Cottonian copy of the original French. The royal edition, therefore, blindly follows Ruffhead's, and has evidently associated an original and a translation which clearly belong to two different sets of MSS., and in so doing has left the English copy very materially defective, producing great ambiguity and much doubt as to the true meaning of the sentence. This Act relates to Justices of Assize and to Keepers of the Peace, and sets forth the power and authority of both in certain particulars. Thus, "And the Justices assigned to deliver the gaols shall have power to deliver the same gaols of those that shall be indicted before the Keepers of the Peace; and that the said KEEPERS shall send their indictments before the Justices, and THEY *shall have power to inquire of the sheriffs, gaolers, and others,* in whose ward such indicted persons shall be, if they make deliverance or let to

[1] Vesp. b. vii. Claud. b. ii. Nero. C. 1.

mainprize any so indicted, which be not mainpernable, and to punish the said sheriffs, gaolers, and others if they do any thing against this Act."

Here the justices of gaol delivery in the first instance, and the keepers of the peace in the second instance, are spoken of; but if we examine the original French it will be found that the expression is clearly illustrated by words entirely omitted in the English translation; and then it will be found that the justices, and not the keepers, are meant by the word THEY; thus,—"*et eient* LES DITZ JUSTICES *poair denquere sur viscountes gaolers et autres,*" &c. Thus this great power, given apparently to the keepers to punish sheriffs, really belongs to the justices of gaol delivery, and the keepers who were not then, (an. 1330) nor at any subsequcnt period, justices in any sense of the term, are reduced to their proper position. But the instance here produced of the easy manner in which the commissioners have made up the royal edition of the statutes of the realm is only one amongst many. I will not fatigue the reader by citing additional instances of the same kind, but I must place before him another sentence still more singularly defective, though no words are omitted in the English translation. In the 18

Ed. 3, stat. 2, c. 4, (already referred to in this work,) we find the following sentence :—"Et qe mande soit a tresorer et as barons de Lescheker de faire venir devant eux tieux commissioners de rendre acompt au Roi," &c. The given translation is in these words :—"And that it *be demanded to* the treasurer and barons of the exchequer *to do come before them,*[1] such commissioners, to yield account to the King," &c. A school boy would be put down to the bottom of his class for such a wretched piece of English as this example affords; and if I am not greatly mistaken, the indignant reader will assuredly reduce the lords high commissioners and the working sub-commissioners, who have dared thus to trifle with the highest interests of their country, to the same low and insignificant place in their own class.

I ask, should such disgraceful translations be suffered to remain upon our statute book? It may be said by some, that it would be dangerous to alter the ancient phraseology of our book of laws, even though that form of expression may appear defective to modern eyes. Be it so; yet of this

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[1] This expression follows the translation as found in the Harleian MSS.; there is, however, a material difference in other respects.

feeble excuse the commissioners cannot avail themselves, because, in many instances, they have altered the old unsightly expressions, and have done more than that, for they have given a translation not warranted by the original, and such as has entirely reversed the sense and meaning of the statute.[1] Upon what principle, if upon any, the commissioners have proceeded I am at a loss to divine. With every manuscript and record in the country at their command, why did they not carefully examine the whole, and select the most perfect for the text, giving all the various readings af particular or doubtful passages at the foot of the page? Had they done this, they would have added but little to their labours, whilst they would have produced a valuable and useful work, of which historians, legislators, and jurisprudists might have availed themselves for the instruction and benefit of succeeding ages. Instead of this, they have reprinted and republished almost every blunder and error, as well of the most important as of the commonest kind, and frequently without note or comment. Thus a work that could not have cost the

[1] As will be seen hereafter when the 34 Ed. 3 is again touched upon.

nation less than a hundred thousand pounds, has been produced for no other purpose than that of encumbering our libraries with useless and unprofitable matter. Defective and faulty as is their work, neither its defects or its faults can be attributed to the ignorance of its authors; but I will not waste my time in searching after the baneful influence that has reduced a work of such high promise to a practical illustration of the ancient fable of the mountain in labour.

May we not demand, in the name of common sense, an authorised version of our ancient statutes? Any argument in support of the necessity of such a national work would be an insult to the commonest understanding. For it may be asserted without fear of contradiction, that a more interesting, valuable, and important book cannot exist than the first volume of the Statutes at Large; and to allow it to remain with all its errors and defects, even in the sumptuous dress of a royal edition, would be a national disgrace.

A very slight glance at the old statutes, or the reading of a few hours at most, is alone necessary to convince any one of the truth of the remarks of that elegant and philosophic writer Beccaria, on the great evils attendant upon laws written in a

foreign tongue.[1] But, as if the obscurity inherent in laws, written in a foreign language now utterly disused, that has passed away and exists but as a tale that is told, and known only to the antiquarian curious in the records of gone-by times, an obscurity greatly enhanced by adventitious circumstances, the ravages of gnawing worms, and the lapse of eight hundred years—as if this obscurity was not sufficient in itself to support "the glorious uncertainty of the law," we find this crying cause of evil aggravated, and rendered still more destructive by a printed translation that is not only defective and erroneous, but in many instances unmeaning, incomprehensible, and absurd.[2]

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[1] Dei delitti e delle pene, c. v. edit. Milano, 1824.

[2] The very style of writing adopted in the ancient MSS. increases the difficulty of understanding them in a most remarkable manner; in fact, many passages cannot be satisfactorily made out, owing to the peculiar and frequent contractions used in particular words, and the condensing (if I may use the expression) of two or more words into one contracted form. At the close of Hardy's preface to his Rotuli Normanniæ, these difficulties are clearly pointed out, and a useful table of the most frequent forms of contracted words is given.

And there appears to me to be indubitable signs of another source of error clearly given in the contracted forms of many of the words, and more particularly in the articles; namely, that some of the ancient transcribers of the French statutes must have been Italians; Lanfranc, archbishop of Canterbury, probably brought over many such men in his suit, who were employed as copyists; and so of the attendants on the Pope's legates and others from time to time, during the first 400 years after the conquest.

And I must observe that a singular fatality seems to have attended even the best written ordinances to be found in our Statute Book; and the fact is illustrated by the two following sentences, one of which I have extracted from Ruffhead's edition, and one from M. Guizot's Essay on the History of France. These sentences are perfectly parallel passages, though they probably belong to two distinct ordinances of the same year (1300), and it will be seen at once how severely the french suffers in the hands of our editors, though some of them have been gentlemen of high standing at the bar, and still enjoy great celebrity unto the present day. The foreign copy is infinitely more correct than our own, but, incorrect as this is, it is a beautiful specimen compared with most of those other statutes which I have had occasion to cite, even of a much later period.

The differences they present are not, except in one or two particulars, of very great importance; and it must be obvious to all French readers that the passage in our book has been revised by some one very imperfectly acquainted with the language of that remote time, whilst in Guizot's work it has been subjected to the pen of a master. But

as these passages were originally written at the close of the thirteenth century they are, notwithstanding their imperfections, of great utility for my present purpose :—

After Ruffhead. Vol. i, p. 140.

Que "soient eslus en chescun conte par la commune de meisme le conte trois prodes hommes chivaliers ou autres loiaux sages e avises qui soient justices jures e assignes par les lettres le Roi overtes de soen grant seal de oyr e determiner santz autre bref qe leur commun garant les pleintes qe le ferront de touz iceaus qe vendrout ou mesprendrout en nul des ditz poyntz des avantdites chartres les contetz ou il sont assignes ausi bien dedenz franchises come dehors e ausi bien des ministres le Roi hors de leur places come des

After Guizot. Essais sur l'Histoire de France, p. 417.

Que " soient eslus en chescun conté' par la commune de meisme le conté, trois prodes hommes, chivaliers ou aultres, sages e avisés, qui soient justices jurés e assignés, par les lettres le Roy overtes de soen grant seal, de oyr e déterminer, santz autre bref que leur commun garant, les plaintes qui se ferront de toutz iceux que vendrout ou mesprendrout en nul des dicts poincts des avauntdictes chartres, es contés ou ils sont assignez, aussi bien dedans franchises comme dehors, e aussi bien des ministres le roy hors de leurs places come des

autres. Et les pleintes oyes de jour en jour santz delay les terminent sanz alluer les delais qe sont allues par commune ley."	autres, et les pleintes oyes de jour en jour santz delai les terminent, santz alluer les delays que sunt alluez par commune ley."

It is not absolutely necessary to express an opinion upon the true cause of the extraordinary character of our ancient statute book, though that character is not to be ascribed to the ignorance of translators or copyists alone. There must have been a constantly operating cause from the twelfth to the eighteenth centuries, and that cause unchangeable in its kind. But in the present century a new principle presents itself, and a tolerably clear idea may be obtained of it by a perusal of the Royal Edition of the Statutes of the Realm. With respect to the great operating cause, acting through a period of six centuries at least, I shall now content myself with indicating the four necessary and easy steps to be taken in order to get at a full knowledge of its nature and progress:—First, let the two cited passages from the ordinance of Ed. 1, in 1300, or either of them, be compared with the ordinances, or statutes as they are more commonly called, in the fourteenth century, in Ruffhead's edition; secondly, compare

these passages with Lord Lyttleton's work on tenures, in its original language, written about the middle of the fifteenth century ; thirdly, compare them also with the last of the old French statutes in the reign of Ed. 4, and with the French of Fitzherbert in the sixteenth century and the case books; fourthly, compare these cited passages with the language of the twenty-three lectures of Lord Coke on fines.

Now it happens that even the profession is no longer indulged with Lord Lyttleton's celebrated work and with Lord Coke's learned lectures on fines, in their original language; to supply in part such serious omissions, and to avoid so disrespectful a treatment of these two learned lords, I will now give a short passage or two from both of their immortal works, to which I now refer ; and thus the most important of the comparisons may be easily accomplished without expense and without the trouble of disturbing the dust and cobwebs of long-neglected shelves :—

First—From Lord Lyttleton's work on Tenures.

Lib. ii. sec. 109.

" Item mults auters divers disparagements y sont, que ne sont specifies en mesme lestatute. Come si l'heire que est en gard est mary a un que

nad forsque un pee, ou forsque un main, ou que est deforme, decrepite, ou ayant horrible disease, ou graund et continual infirmitie: et (si soit heire male) si soit marry a feme que est passe lage denfanter. Et mults auter causes de disparagements sont, *sed de illis quære*, car il est bon matter dapprender."

One more short section, perhaps, will suffice.—Sec. 87, Lib. ii. "Item si feme sole ferra homage a son seignior, el ne dirra, jeo deveigne vostre feme, pur ceo que nest convenient que feme dirra que el deviendra feme a ascun home forsque a sa baron quant el est espouse: Mes el dirra jeo face a vous homage, et a vous serra foial et loial, et foy a vous portera des tenements que jeo teigne de vous, salve la foy que jeo doy a nostre seignior le Roy." [1]

The following extracts are selected from Lord Coke's lectures on fines, originally ushered into the world by the title

"LE READING DEL MON SEIGNIOR COKE. 34 *Eliz. Anno*, 1592. Sur l'Estatute de 27 E. 1, Appelle l'Estatute *De Finibus Levatis*."

First sentence of the sixteenth lecture:—"Continual claime fait hors de terre, quant le partie

[1] The reasons for selecting these two sections are, they are short, and they contain no incomprehensible law terms.

poet enter sans doubte de mort, ou battery, est void. Auxi continual claime ne availera le partie, quant son entry n'est congeable; si non que il soit en especial cases, come si le disseisee ne osast enter sans doubt de mort, ou battery, & il vient deins le view del terre, et claime le terre, le claime est voide, & uncore liverie poet estre del terre deins le view, mes riens passera, tanque le Feoffee enter."

This sentence is one of the clearest of legal technical terms to be found in the lectures. I will now add the two first sentences from the twenty-third lecture which I presume is purely historical.

"Est ascavoir, que touts matters en ley sont triable per les Justices; touts matters en fait, si non en especial cases, sont triable per pais.

"Et *nota*, que en ancient temps avoient estre 6 Justices de l'un Bank et l'auter; issint que si inferior court commit ascun error, ceo serra determine, & revers per auters 6. Car come matters en fait serra trie per 12 Jurors. issint matters en ley per 12 Justices. Mes gager del ley de non summons en *Præcipe* fuit permitte per deux mains, 38 Ed. 3, 10, a. Et issint appiert en nostre livers, si un voile gager son ley en Dette, le ley voit, que il portera ove luy 12, de ses vicines, que

jure, que ils intendont en lour consciences, que il dit vray." [1]

Now in making the proposed comparisons, the reader must be left to his own reflections, and to draw from the premises his own deductions. But if he will also read the touching episode regarding the fate of Dr. Cowell, briefly related in one short and effective paragraph in Mr. Butler's preface to the 13th edition of Coke's first Institute, [2] and then call to his recollection the well known fable of "the lion, the ass, and the fox that went out to hunt," Dr. Cowell's fate will operate upon him, all reflecting persons, as powerfully as the fate of the ass operated upon the fearfully admonished fox; so that whatever disposition may be felt to make known the deductions actually drawn from such comparisons, the astuteness of the fox, rather than the honest simplicity of the ass, will be taken as an example, and silence for a time at least preserved.

The four steps, however, that I have now indicated, will, by a little reflection, bring to light the

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[1] I repeat the same reasons for selecting passages out of Lord Coke's lectures as I have given for selecting from Lyttleton's work.

[2] See the 19th edition, by C. Butler, 1832, p. 20.

true cause of the disgraceful state of our old statute book. And if I mistake not, those learned commissioners, whose labours produced the royal edition of the statutes of the realm, had no little insight into the true state of things, but their silence exhibits an example of

"Letting I dare not wait upon I would."

In short, they learnt wisdom from the fate of Dr. Cowell, or the moral of the fable.

ON THE TITLES GIVEN TO THE ANCIENT STATUTES.

There is yet another evil pregnant with great danger, arising out of the present state of our statute book, and even that edition published by royal command is subject to a like objection. This great evil lies in the titles given to the ancient statutes and to certain parts of them now magnified into distinct chapters or acts.

Long before the date of Ruffhead's edition of the statutes at large (1769) a custom had arisen of giving a name to certain of the statutes, or to parts of them, artificially divided into distinct chapters; and amongst the earliest publishers, Rastall, in 1557, seems to have indulged in this custom, though very sparingly, as is illustrated in

his "Alphabetical Collection of the Statutes." His titles are very short, as honors, homage, and fealtie, forests, chases, &c., and under the term "justices of the peace" we find several acts without those other titles that have since been manufactured and rolled out into more imposing lengths, in editions by later and more ingenious authors. The preface to this old edition contains a passage touching the titles and preambles; it is a perfect curiosity, and is not only most instructive as to the unceremonious manner in which the "reverend sages, learned in the law" of olden time, treated our venerable statutes, but also shows that our ancestors were not entirely free from that disease which a modern sage, whose name is found amongst those high commissioners who have handed down to posterity the bootless edition of the statutes of the realm, has been declared to possess—

"His disease is a dullness that sits in the head."

Rastall's words are—"The residue of all the statutes imprinted have I put in this work (as I suppose in their apt tytles) *word for word* as they be in the great statutes, only *leaving out*, as well certayne *superfluous words*, as also *the most parte of the preambles*, for that I feared that if I should

have putte in all the preambles, thys booke would have growen so bygge and so thicke that it would not have ben coteined in this volume. Nevertheless I have (I trust) put in the preambles without which the body of the statutes cannot be well perceived."

After such a passage as this we shall not be surprised to find that Rastall had no very clear idea of what was a superfluous word, or what was necessary for the well perceiving of the body of the statute.

The division of the ancient statutes into chapters is comparatively of modern date; no distinction of this kind is observable in the original MSS. An illuminated letter in some and a larger letter in others being placed at the commencement of most sentences or of some new subject;[1] and there is no title given to characterise the object of the sentence. Sir E. Coke, in his institutes, almost invariably quotes the statutes either after the chronological order of the year of the reigning monarch in which they were enacted, or after the name of the place wherein the parliament met at the time the law

[1] The Bodleian; and the Cottonian, and Harleian MSS. in the Brit. Mus. may be easily consulted in proof of these facts.

was made; thus treating the strange titles with indifference. These superimposed titles may be said to express nothing more than some one's opinion of the purport and subject of the statute or chapter beneath. *A priori* there is nothing very objectionable in this; but the consequences resulting from the use made of those titles are fearfully great, both as regards the law and the practice of the law. Thus a statute is quoted upon a subject to which it has no relation whatever, merely on account of its fallacious title. In Dickenson's Quarter Sessions, edited by that highly talented gentleman, Mr. Serjeant Talfourd, page 2, we find this passage:—"By 1 Ed. 3, st. 2, c. 16, *entituled*, Who shall be assigned justices and keepers of the peace, it was directed, &c.," yet the original chapter has no title whatever. This cited title is no more a part of the statute than it is a part of any *senatus consultum* of the Roman empire; and the body of the chapter makes no more mention of justices of the peace than of the ephori of ancient Greece. The title here given has been placed at the head of the chapter probably for some supposed convenience of reference, but it has been the means of giving a false construction to the act itself. The term

"justices" is as much a matter of pure invention as is the whole title—no authority whatever for either is to be found in the entire statute. And Mr. Serjeant Hawkins, a name pertinaciously thrust into almost every page of Burn's Justice, as of high authority, allows in the preface to his edition of the statutes,[1] "It may be objected that the titles of the old statutes ought not to be printed, none of them being in the original records." Nothing can be more fallacious, nothing more calculated to mislead the student at law, or the county magistrate, than those fictitious titles. If the index to the statute book be consulted upon the subject of justices of the peace, a great many references to the early statutes will be found; though not one statute mentions the justices of the peace prior to the 36 Ed. 3. Is it not dangerous, therefore to cite statutes in support of a particular fact, when the evidence depended upon is not in the statute itself, and nowhere to be found but in an extraneous, unauthorised, and superimposed title. Such a course as this, though followed by very grave and learned gentlemen, appears to me as indefensible and as blamable as the conduct of the

[1] Fol. 1735.

attorney's clerk, who, as the story runs, when desired to give the date, consideration, and term, named in a certain deed, sought his information in the indorsement of the instrument instead of looking into the deed itself.

If we turn to the 34 Ed. 3, c. 1, we shall find that the title is substituted for the law; and the chapter merely cited as the rule for the application of the law. This statute has received the modern title of "What sort of persons shall be justices of the peace, and what authority they shall have." This title is made the law, and the several incongruous provisions are at once applied to justices of the peace, as rules for their conduct and the measure of their authority; it is so quoted, so used, and so acted upon, and I pretend not to the power of persuading lawyers by profession that by so doing they are wrong.

Seeing that criminal prosecutions before justices of the peace proceed by informations, when out of sessions, and by indictments when in sessions, some reasonable doubt may be entertained whether this 34 Ed. 3, c. 1, has not been repealed by the 11 Hen. 7, c. 3, which is in the following words: —"The justices of assize in their sessions, and the justices of the peace in every county, upon

information for the king, shall have authority to hear and determine all offences and contempts, *(saving treason, murder, or felony,)* committed by any person against the effect of any statute made and not repealed."

Now in the 1 Hen. 8, c. 6, this statute is *said* to be repealed; the words are not given in Ruffhead's edition. But it is clear that the justices of assize always tried all manner of felonies; and it may perhaps be presumed that only so much of the statute of 11 Hen. 7, c. 3, was repealed by this of the 1 Hen. 8, as seemed to repeal the old power of the justices of assize, for no subsequent statute takes further notice of this of the 11 Hen. 7, and the general practice of the courts of quarter sessions supports, or rather is agreeable to, the law of this 11 Hen. 7. I merely mention this for the consideration of those who think that justices are directly bound by the 34 Ed. 3, c. 1.

But is there a justice of the peace who has acquired any knowledge of the duties of his office that does not know full well he has not the power or authority, either in or out of session, "to hear and determine at the king's suit all manner of felonies and trespasses;" not even in the present day has the justice such power, though it is no-

torious that the powers of justices of the peace have been enlarged and extended from the period of their first institution to this hour, and notwithstanding Peel's Acts, and others more recent, have thrown into the court of quarter sessions a vast increase of subjects which were formerly within the competency of the higher court of assize alone. Let that article in Dickenson's Quarter Sessions be consulted,[1] and well reflected on, which treats of "offences over which the sessions have jurisdiction by the terms of their commission;" let the different opinions on the particular cases, and of the several authorities cited, be also consulted; and, finally, let the practice of the courts of quarter sessions be considered with an equal earnestness, and I am confident that no well constituted mind or well intended person will differ from this opinion I now venture to advance—that justices of the peace do not try, nor should they, with no other than their present *property* qualification, try "all manner of felonies and trespasses."

But though this power is indeed limited, yet is it fearfully extensive, and great and serious incon-

[1] Chap. 3, sect. 1, p. 128; see also Blackstone Com. B. 4, C. 19, p. 8.

veniences and errors have happened and will continue to happen, as the natural consequences of the present confusion of ideas, and the ill digested laws regarding the powers of justices of the peace; nor does it avail much to say the errors of magistrates are not without redress.[1]

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[1] "Such a course of proceeding," (the application to the secretary of state for redress of errors in the judgments of inferior courts,) "though it be frequently necessary for the purpose of preventing injustice, is still but a means of palliating a great defect in the constitution of your Majesty's criminal courts of inferior jurisdiction; and we cannot but observe that this is a defect which is grown into one of great importance from change of circumstances, and particularly by reason of the increased extent to which the criminal business of the country is now transacted in the courts of quarter sessions. Those courts which in former times seldom exercised jurisdiction as to higher offences than *petit* larciny, are *now* in the habit of trying nearly every species of offence, including even cases where the court has no discretion as to the punishment, but is bound on conviction to pass sentence of transportation for life."—*First Report from H. M. Commis. on Criminal Law*, p. 26.

There are other soufces also for the redress of grievances arising out of the erroneous judgments of justices, namely, by actions and indictments in the superior courts. But these sources are unattainable without great expense; and the law protects, by extraordinary advantages given to magistrates in making their defence, that "ignorance of the law" which is not allowed to be pleaded even in mitigation of the punishment awarded to the poor uneducated and unprivileged offender.

There is also a provision set forth in the terms of our commission in "cases of difficulty upon the determination of any of the premises" before us, whenever the same may arise, to refer the same to the justices of assize. This, however, is but the repetition of the injunction given to justices of *eyre* in the olden time, as by the 9 Hen. 3, c. 12, which says, "and those things which

The practice of quoting and acting upon these unauthorised titles given to the old statutes has the effect of changing the whole law into mere matter of opinion; and thus the statute law becomes by this kind of forced interpretation converted into something resembling the common law. For the title is as a decision upon the Act, but unfortunately in this case the decision overrules the Act itself. Or how else but by an entire perversion of the whole statute could the 34 Ed. 3, c. 1, be made to apply to, or comprehend, an order of justices that, at the time it was passed into a law, had neither "a local habitation or a name;" for justices of the peace *eo nomine* were not known till the 36th year of the same reign, as I have previously shown.

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for difficulty of some articles cannot be determined by them, shall be referred to our justices of the bench, and there shall be ended."

But these barriers avail but little against any justice who may boast of his ignorance of the law, and who may declare that "it is the wise spirit of the institution that magistrates should be ignorant of the law, and adjudicate according to their own strong sense of right and wrong." But such *strong sense* will be found greatly below proof in the hour of trial, notwithstanding the opinion may be very consolatory to those who profess it; and their dependence upon the high opinion of Lord Coke, who tells us, "the laws of England are *Leges non scriptæ*, but divinely cast into the breasts of men, and built upon the irremovable rock of reason." Le Primer lecture del Mon Signior Coke. p. 2.

Hence another great evil arises out of the defective state of our statute book, and greatly aggravated by the universal adoption of these titles,[1] an evil forcibly pointed out by Beccaria[2] in his observations on that interpretation of the law by judges, by which the magistrate, the minister of the law, is converted into the legislator, the maker of the law. The talented author of a modern work[3] seems to have confounded the discretionary power of a magistrate with that which is more properly called interpretation or construction of law. This discretionary power is with us exercised to such an extent as to make a law apply to an act, or to comprehend an offence never contemplated by the legislator; and decisions of this kind in one particular case are often forced upon the public as the law of the land, and again made to apply to other cases presenting the slightest similitude, or sometimes none at all; decisions exhibiting every degree of doubt, every shade of difference, with every kind of incongruity, contrast and

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[1] These titles are preserved in Crabb's Digest and Index of all the Statutes. Lond. 8^{0} 1841.

[2] Dei delitti e delle pene, ch. 4. Interpretazione delle leggi.

[3] Etudes Législatives, ch. 12, p. 177. Par J. N. Paris, 1836.

contradiction; such are the natural consequences of the total absence of a recognised system of jurisprudence, and of well considered principles.[1] But though magistrates, whether of a popular institution or not, should have a discretionary power within a certain *maximum*, and must necessarily exercise their judgment upon the applicability of a law to a particular case, yet I would rather they should be reduced to that which this ingenious French writer calls "*des machines à sentences*," nay, that our laws should be administered by *des machines à vapeur*, than subject to the capricious, uncertain, and ever varying interpretation of any magistrate, be he of high or low degree.[2] I would write something more, but the word "Code" alarms the bench, the bar, and the whole parliament of England.

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[1] See also Fourth Report of Com. on the Criminal Law, p. 14, on this subject. And also the excellent observations of L. J. Carré, in his Traité du droit Français dans ses rapports avec la juridiction des Justices de paix. Tom 1, p. 13 & 14, No. 26, and De l'application et de l'interpretation des lois, p. 84. Paris, 1833. See also Codes François Expliqués. Par J. A. Rogron, preface. p. 6, col. 1. Paris 1833.

[2] This uncertainty and ever varying interpretation is singularly illustrated by more than 100 examples in the first 200 pages of Roscoe's Law of Criminal Evidence; by Granger, edit. 1840; and still more amply in A TREATISE ON THE LAW OF EVIDENCE, by Phillips and Amos, 8th edit.

But to return to these superimposed titles, which, in the royal edition of the statutes, are displaced from their high station at the head of the various chapters, and occupy the less pretending place of a marginal reference; a position not less objectionable, and equally productive of error. Had these capital titles been the result of such subtleties and refinements or fictions as are employed to bring about an arrest for debt, or constructive treason, constructive fear, &c. &c.,[1] or had they been the result of some philosophic or logical method of induction, some apology might have been offered for them,[2] but nothing of the kind can be pretended or supposed in their defence; placed there by some bold and daring hand, the title

"Like a tall bully lifts its head and lies."

Is it not a matter of easy inference from this

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[1] For the most effective piece of "construction of law," read the first eight or nine pages of Gurney's Report of the Trial of Frost and others at Monmouth. I call it the most effective piece of construction of law, because it will produce the greatest effects towards bringing this kind of judicial legislation to an end. For, as has been truly observed by the editors of that useful periodical, "The Justice of the Peace," "Men's minds in this age are not satisfied with this figurative ratiocination." No. 4, Jan. 1841, p. 43, col. 1.

[2] See Blackstone's Apology, b. 3, c. 4, p. 43, for legal fictions.

slight sketch and brief notice of some of the most obvious defects and common errors still remaining in the originals and translations of our ancient statutes, that a strict revision of the whole of them is absolutely necessary. And if we take into consideration, at the same time, the bold and extreme opinions by some pertinaciously adhered to, and by others treated with indifference, as to the admissibility of many of the statutes now upon our book of laws, shall we not find ample reason not only for a revision but also for the exercise of that power which Filangieri recommends under the title of a censorship.[1] By which obsolete, expired, repealed, abolished and doubtful statutes might be removed, the redundant cut down to a reasonable length, and those containing various discordant and unconnected subjects, distributed under distinct and appropriate heads.[2] But I

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[1] La Scienza della Legislazione, lib. 1, cap. 8. Milan, 1817.

[2] In Lord Coke's 1st and 3rd Inst. are several examples of the inadmissibility of many statutes; but Wm. Prynne, in his preface to his Exact Abridgement of the Records in the Tower of London, &c. p. 8, fol. Lond. 1689, treats with something more than indifference the opinions of Lord Coke, and proves this mighty man of law to be an egregious blunderer, to say the least of him. In Mr. Charles Butler's edition of Coke's 1st Institute, Mr. Prynne is taken to task for daring to impugn the high authority of Lord Coke. But even in Burn's Justice, my Lord Coke is fre-

forbear to enlarge my remarks upon this subject, as being somewhat out of place, and as requiring a more important treatment than my present design will afford.

I will now add a few observations upon a singular circumstance connected with the English

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quently shown to be in error, not only in mere matter of opinion, but also in matter of fact, arising clearly out of his ignorance of the French language; see vol. 1, p. 35, wherein it is clear my lord did not know that *pees* (paix) was feminine, and *pais* (pays) was of the masculine gender.

Similar examples are seen in Lord Coke's lectures, as published in the first part of the Inst. p. 2, edit. 1719. Thus, "*Le primer lecture;*" again, he has "*Le forme del fine,*" &c. p. 7. In short, his French is a curiosity of literature. The first report of the commissioners on criminal law, p. 29, gently hints at a blunder of Sir E. Coke's in his interpretation of a passage from Bracton. "Great as Lord Coke is, his deductions and citations from the more ancient writers are not by any means implicitly to be relied upon. His name has thrown a lustre over many an error. Nothing would be more easy than to adduce *innumerable* instances in support of this assertion"—says Beames, in his translation of Glanville, p. 356. And yet my Lord Coke would set aside the law, upon no better evidence than his own ignorance of the language in which that law is written. But so "peremptory is the adhesion unto authority," that almost the first book put into the hands of students at law is "Coke upon Lyttleton." We need not be surprised, therefore, at the assertion, "that there is scarcely an estate in the land with a sound title." And in Roger North's life of the Lord Keeper Guildford we read, "Coke's Commentaries upon Lyttleton ought not to be read by students, to whom it is at least unprofitable, for it is but a common place book, and much more obscure than the bare text without it; and, to say truly, the text needs it not, for it is so plain of itself, that a comment, properly so called, doth but obscure it."

version of the 34 Ed. 3, c. 1, as it appears in Ruffhead's edition of the statutes at large.

The original French is as follows:—

"Et de prendre et arester touz ceux qils purront trover par enditement ou par suspecion et les mettre en prisone, et de prendre de touz ceux qi *ne* sont de bone fame ou ils serront trovez suffisant seurete et meinprise de lour bon port devers le Roi et son poeple et les autres duement punir," &c.

The English version is thus given:—

"And to take and arrest all those that they may find by indictment, or by suspicion, and to put them in prison; and to take of all them that be *not* of good fame, where they shall be found, sufficient surety and mainprise of their good behaviour towards the King and his people, and the other duly to punish," &c.

Now in the royal edition of the statutes of the realm, the word "*not*" in the English version is printed within brackets, and a note upon it, stating "all translations read thus," and the *ne* is omitted in the French original.

Rastall, in his alphabetical edition of the statutes, and who was so careful as to omit all superfluous words, has in this statute the word *ne*.[1] I

[1] In Cay's edition of the statutes, "*ne*" is omitted.

have not the slightest doubt but that this word *ne* has been mistaken for *en* by some old transcriber, for if we substitute *en* for *ne*, the passage will be complete in language and in sense. But the *ne* alone, without the necessary *pas* after the verb *sont*, cannot make so strong a negative, as to warrant the English translation as it now stands printed. Is it not extraordinary that the *ne* should be omitted in the french text of the royal edition, and the *not* retained in the English version? This is a mystery, and will ever so remain. As this statute now appears, either in Ruffhead's or the Royal copy, it is a mass of nonsense in this particular; and the result has been and is, down to the present day not only a perversion in practice, of the law of sureties for the good behaviour, but even a total reverse of the old law and custom of taking such sureties, and an entire misapplication and destruction of the true meaning and object of this statute.

Any one acquainted with the common principles of the French language will easily discover the causes of this peculiar interpolation of the word "*not*" in the English translation. And, perhaps, also, he may not be surprised at the singular fate of this Act in an interpretation which, had I

not witnessed, I could not have supposed it possible, by a gentleman "learned in the law;" it was held that the "one lord, and with him three or four of the most worthy in the country," meant "the lord lieutenant and the magistrates." And by a gentleman *by confession not* learned in the law, it was held that the expression "to take of all them that be not of good fame, where they shall be found, sufficient surety," &c., meant "to take all persons of *ill* fame wherever they are found, and to bind them over to the good behaviour." And upon this interpretation process issued, and was completed, against a married woman of reputed "ill fame;" a process worthy of being placed amongst the *mirabilia* of the age.

By way of bringing this appendix to a close, a few observations are now subjoined upon the expression *la garde de la pees;* and therefore I shall now give the words of 1 Ed. 3, s. 2, c. 16, as they appear in the original French,. according to Ruffhead's edit:—"Item pur la pees meultz garder & meyntener le Roi voet qen chescun Countee qe bones gentz et loialx queux ne sont mye meyntenours de malveis baretz en pays soient assignez *a la garde de la pees;*" translated "*to keep the peace.*"

This precious morceau is a curiosity in literature; that is, to all those who have not been made fastidious in these matters by D'Israeli's popular book. Now let us suppose, and certainly I draw largely upon the imagination of my reader, that all is right in this singular little chapter. And also that for the purpose of protecting property, and maintaining the peace, certain persons of good character are by this statute appointed to be guards of the peace, or "the peace guards," as would be now said in modern phraseology; for we must not forget our common expressions of life guards, foot guards, body guards, coast guard, &c. Then reverting to the Statute of Wynton, we find what sort of persons these guards are composed of, by reason of the scale of their property, and the nature of their armour, set forth and appointed in that statute.

The expression *la garde de la pees*, should have been *la garde de paix*, and beyond a doubt such must have been the intention of the ancient writer. Here, then, we find, that in the time of Edward 1, a certain armed police force existed, subject to the inspection of two constables, not the petty constable of modern times, who were to review this force, and to report to

the judges its state as to arms, and its conduct as to the pursuit (suit) of evil doers, &c. And these constables, by the nature of their duties, must have been men possessing a knowledge of armour and horses, &c.; and it may be reasonably inferred that such were the constables of castles in those days. Thus the statute of the 1 Ed. 3, s. 2, c. 16, merely declares the continuance of the Statute of *Wynton*.

But the peculiar effect of translating the expression *a la garde de la pees*, by the phrase "to keep the peace," will be seen in the next statute, by which the first error is considerably increased in the second instance. The first words of 2 Ed. 3, c. 6, are "et quant *a la garde de la pees* en temps avenir" are translated, "item, as to the keeping of the peace in time to come." Here we have the same French expression represented in English by the active participle used as a substantive "the keeping," which before was represented by a verb in the infinitive mood, "to keep," not used substantively, and in both cases the translation is decidedly wrong, giving a meaning to the French which no Frenchman could have intended then, or would now in the present day intend by these words.

And it must be remembered that this last Act is merely passed for the purpose of enforcing in express terms the Statute of Wynton.

In the next statute[1] we find the French text declaring the business of those good and loyal men who were to be appointed in each county, to be in express and correct terms *a garder la pees*, also, but correctly, translated "to keep the peace."

It must now be evident that the two expressions in French, "*a la garde de la pees*," and "*a garder la pees*," cannot with any truth or propriety be translated, and the true intent of them both be expressed by the same English words. The first describes a certain power or force, and the second expresses its application, or that business to be done by it, which we should naturally expect from the very terms used to designate that power. And in this statute, these peace guards, after the declaration of their duty to guard or keep the peace, are designated "*gardeins*," guardians. This latter term would not be used in the present day, but the word "*guards*" substituted in its place. This Act also sets forth that it shall be named in the assignments, (that is the assign-

[1] 4 E. 3, c. 2.

ments of those assigned to keep the peace,) that those who shall be indicted or *taken* (*pris*) by the said guardians, shall not be let to bail by the sheriffs, &c., but only to be delivered by the common law.[1]

Is it not clear that justices, or magistrates, do not *take* prisoners, do not accuse or point out (enditez) the evil doers; but that such are taken and indicted or informed against by the police force, whether armed like those guards of the Statute of *Wynton*, or unarmed like our parish constables, or half armed like our new police force. The very mention of a taking of evil doers by these guardians is sufficient in this case, even without considering the context, to show the true character of *la garde de la paix*, and of their assigned business *a garder la pees*.

But to speak strictly the phrase "a la garde *de la* pees," has no meaning at all attached to it, for it represents an impossible thing—a nonentity; but I would not avail myself of this grammatical objection in the first instance, that it might not

[1] In the present day we have our coast-guard; in ancient days, as appears by the rolls of parliament in the 46 E. 3, A. D. 1373; there was also a coast-guard called "Petiwacche," but named in the king's answer to a petition, "Les Gardeins sur les costers de la meer." See Appendix to Ruffhead, vol. 9, p. 45.

be said the question is merely evaded, and not fairly met.

The expression "gardeins de la pees," though equally incorrect, in the 18 Ed. 3, s. 2, c. 2, yet it evidently relates to a different class or order of persons. Since two or three only, being of the best reputation in the counties are to be assigned by the king's commission. And they are not to indict or take evil doers; but "with other learned in the law, to hear and determine felonies." I merely mention this to show here, in this part of my book, that the term *gardeins* like that of *constables*, is equally given to different orders of persons and offices, or ministers of justice. We then turn again to the old question, whether the keepers of the peace were subsequently made justices of the peace? and this I think I have already satisfactorily answered by a clear negative.

PART II.

Although the following observations were written some time subsequent to the completion of the original purpose of the first part of this Appendix, yet as they also show some of the principal defects of our ancient statute book, they form in reality a continuation of my subject, and may be, with no great impropriety, added to this part of my work:—

SECTION 1.

SOME OBSERVATIONS ON READING THE FIFTH REPORT OF THE COMMISSIONERS ON CRIMINAL LAW, CHIEFLY RELATING TO SOME STATUTES ON MAINTENANCE AND CHAMPERTY.

"It will be observed that the most ancient enactments given in the Digest are mere literal translations of the Norman-french originals. Some of these are highly important; and in those instances where decisions, founded on those statutes, have explained or qualified their meaning, we have preferred giving the effect of such decisions in dis-

tinct articles to making any change in the structure of the original."—5th Report, p. 2.[1]

Now, the meaning of this passage is thus given in the Law Magazine, No. 49, for August, 1840, page 3:—

"They (the commissioners) state that, in giving the more ancient enactments, they have adhered to the literal translation of the Norman-french originals, the text on which judicial decision is the commentary."

On reading the words of the commissioners I fully expected to find "a mere literal translation of the Norman-french originals," as these originals appear in Ruffhead's edition of the Statutes at Large, and, consequently, that a new and correct translation had been given; but my expectations were sadly disappointed on reading the review of the report as cited above from the Law Magazine; for it is obvious that the reviewers have truly stated that "THE *literal* (?) translation" has been adhered to by the commissioners, and my regret was full and deep when I found in reality the old translations *literally* adhered to, and quoted word for word in the commissioners' report, just as they

[1] This sentence contains a tolerably clear hint that the decisions and the statutes are not in strict accordance.

appear in Ruffhead's edition. Now, had the commissioners and the reviewers adopted a more correct mode of expression, no false expectations would have been raised and no hopes disappointed. To me it appears that both the commissioners and the reviewers have adhered literally to the old translations,— things vastly differing from literal translations,—for, beyond all doubt, they are not literal, nor free, nor figurative—but false; and equally beyond all doubt, that as these false translations form "the text on which judicial decision is the commentary," according to the reviewers, so the commentary must be equally erroneous with the text on which it is raised. But the meaning of the commissioners is obscure, arising from a confusion in terms. They say that they have given "literal translations of the Norman-french *originals;*" and then go on to say they "have preferred giving the effect of decisions founded on those statutes to making any change in the character of the *original.*" I presume the word "*original*" here means the literal translations; but if not, what punishment would be great enough for even the design, the intent, to make any change in the Norman-french originals, the only originals of which the commissioners speak.

But I mean not to condemn the commissioners for any little error, or even for that great confusion into which they have evidently been thrown by the very nature of their task. I cannot conceive that any set of men could have had imposed upon them a more painful task than theirs. And it is equally inconceivable to me that any set of men could have been placed in a situation of greater delicacy and danger than these learned commissioners. Now, however, they have advanced *in medias res*, —to retreat is impossible without disgrace, and to advance is merely to secure the remorseless condemnation of a very large proportion of their professional brethren.

What have the commissioners done? What crime can they have committed thus to bring down upon themselves such a terrible sentence? Oh, not much. They have merely afforded a ludicrous spectacle at which the unprofessional bystanders and the lookers on are wonderfully enlightened, and laugh most lustily. They have merely brought into collision certain ancient Norman-french statutes with the judicial decisions of the "reverend sages learned in the law," "my wise masters." Judicial decisions are cited, grave opinions are quoted at full length, and

with all the tact and delicacy of the learned commissioners they are unable to conceal their contempt for these grave and absurd opinions, and by the help of italic letters[1] they have something more than hinted at the visionary basis upon which those judicial decisions have been raised; thus all the sacred opinions, irrevocable decisions, that have sent hundreds to the grave in miserable penury and disgrace, and the *literal* translations and the Norman-french originals are brought into violent and destructive contact.

And the whole is wound up with an epilogue that tells us the ancient Norman-french originals, with their *literal* translations, and all the stupendous commentary of judicial decisions are to be swept away in one fell swoop, and to rot with "the refuse of fame."[2]

Be it so: but then a petition will be sent up to the throne to pray for the extension of the royal mercy for the preservation of our old "Norman-

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[1] In p. 38 the word maintenance, twice repeated in the 28th Ed. 1, stat. 3, c. 11, is printed in *italics*, the word in the original Norman-french text being *champart*.

[2] "Upon the whole these statutes, if not entirely obsolete, have become so, *that they may, we think, be dispensed with.*" 5th Report, p. 38, and the judicial decisions too of course.

french originals," by a timely respite and a free pardon.

And now, having witnessed this "hurlyburly" spectacle, as one of the *profanum vulgus*,—a peep behind the scenes may be perhaps allowed.

I may now respectfully ask leave to examine one of these condemned old statutes of the Norman-french, just before it is sent off to keep company with the books of the Sibyls; and as the first offered to our notice is the 28 Ed. 1, c. 11, and as the commissioners have introduced it with a quotation from Mr. Barrington,[1] so it must be the first for examination. This gentleman has shown more astuteness than learning in his observations; he says, "The 11th chapter forbids *maintenance* and *champerty*, which *is* frequently provided against by subsequent statutes. *This* offence therefore must have been commonly practised, although we never hear of *such a* prosecution (?) at present. The reason *of which* (?) seems to have been that when a man of power formerly supported a lawsuit, the judges were influenced in their determinations, as they are now in every

[1] 5th Report, p. 37, with a reference to Barrington on the Statutes, 185.

part of Europe, except in this happy and free country." [1]

Now I will pass over the illiberal conduct of Barrington in paying a compliment to our own judges at the expense of every judge throughout Europe, and proceed to consider his ingenuity and the statute. In the first place, however, the reader must actually have before his eyes this 11th chapter both in French and English, or my words will not be credited and my observations will be unintelligible:—

"And further, because the King hath heretofore ordained by statute, that none of his ministers shall take no plea for *maintenance*, by which statute other officers were not bounden before this time. The King will, that no officer nor any other (for to have part of the thing in plea) shall not take upon him the business hat is in suit, nor none

"Derechief pur ceo qe le Roi avoit avant ordene par estatut qe nul de ses ministres ne preist nul plai a *champart*, e par cel estatut autres qe ministres ne estoient pas avant ces houres a ceo lieez voet le Roi qe nul ministre ne nul autre pur part aver de chose qe est en plai enpreigne les busoignes qe sont en plai. Ne nul sur tieu covenaunt

[1] These sentences are admirably adapted to the purposes of Cobbett's grammar.

upon any such covenant shall give up his right to another; and if any do, and he be attainted thereof, the taker shall forfeit unto the King so much of his lands and goods as doth amount to the value of the part he hath purchased for such *maintenance*. *And for this atteindre*, whosoever will, shall be received to sue for the King, before the justices before whom the plea hangeth, and the judgment shall be given by them. But it may not be understood hereby, that any person shall be prohibit to have counsel of pleaders, or of *learned men in the law for his fee*, or of his *parents* and *next friends*."

soen droit ne lesse a autri. E si nul le fet e de ceo soit atteint soit forfet, e encoru devers le Roi des biens ou de terres lempernour la value dautant come sa partie de son purchaz par tele *enprise* amontera. *E a ceo attaindre* soit resceu celui qui suire vodra pur le Roi devant les justices devant quieus le plai avera este e par eus soit le agard fet. Mes en ceo cas ne est mie a entendre qe home ne puet aver consail *de coutours* e *des sages gentz* pur *du soen* donant ne de ses *parentz* e ses *procheins*."

And this is said, by the commissioners, to be a mere *literal* translation! and one of THE *literal* translations, according to the opinion of the reviewers, I presume.

It will be at once seen that the French text treats of *champerty* and the English text treats of *maintenance*, for the word *champart* is translated by the English word *maintenance;* and that no mistake may be made, the word *enprise*, and which alludes to the thing undertaken, namely, *champerty*, is also rendered into English by the word *maintenance*. Thus we have a specimen of "mere literal translations of the Norman-french originals;" literal in the estimation of lawyers truly, but unless the word *literal* has undergone a "singular deviation from its original sense," as the commissioners say has been the fate of the word barretry,[1] no other class of mortals in this world would venture to call the word *maintenance* a literal translation of the word *champart*. Mr. Barrington is a man of genius, and all dispute is at once cut short by his wit; for he says, "maintenance and champerty *is* frequently provided against," &c., and that this chapter forbids them. And herein lies the wit: "this chapter" means, in his opinion of course, the whole French and English text together; and, consequently, as the French text names champerty and the English

[1] Fifth Report, p. 38, note at the bottom of the page.

text names maintenance, both are at once treated of and forbidden; and as both these distinct offences form the nominatives to the verb *is* in the singular number, so the learned and witty gentleman, knowing well that man and wife are one flesh, has married the two *originals*, and treated the double text of French and English as one chapter, "argal," one statute, and champerty and maintenance as one offence. The commissioners have had the temerity, however, to treat champerty and maintenance as distinct offences, and thus the marriage tie has been most unceremoniously cut asunder—"the unkindest cut of all." As to Mr. Barrington's reason for the common practice in ancient times, of *this* offence, it is beside the question, and so perfectly puerile,[1] and so unscrupulously unjust both towards the judges of ancient days as well as of those of modern times in Europe, as to be utterly undeserving of notice.

But there are other important matters to be observed upon in this chapter of 28 Ed. 1, and again as to its literal translation; and I will

[1] It is perfectly clear that Mr. Barrington knew not the true meaning of the French word *champart*.

even pass over the absurd translation of the words "e a ceo attaindre" by the expression "and for this atteindre," thus converting a verb in the infinitive mood without an article into a substantive, and perverting and confounding all sense and meaning of the chapter.[1] Let the last sentence be carefully read, and the reader will find no authority in the French text for the expression "*or learned men in the law,*" because there are no French words at all for the English words "in the law." And as to the French word "contours," translated by the English word "*pleaders,*" it may pass, though it is provokingly equivocal, and perhaps not a little reproachful to "the men learned in the law" named immediately after. And now the most important points to be observed upon are found in the words "ne des ses parentz e ses procheins," translated "or of his *parents* and next *friends.*" Here truly we have a perfect specimen of the literal for "*parentz*" is translated "*parents,*" but unfortunately for the mere literal it it also merely incorrect; and as to the word "friends," this is a mere flight of genius in the

[1] This method of translating is very common in these "literal translations."

translator; also the word "*fee*" is an invention. *Parentz*, when in the singular number, is never put for a *parent* by the French, and in the plural number most rarely—so rarely, indeed, that it is almost universally used in the sense of the English word *relations*. If it be conceded in the present instance to mean *parents*, then there is a manifest absurdity in admitting mere friends, however *near* those *friends* may be. But *procheins* may be very commonly used in the sense of "*next of kin*," and if used in this sense, then the word *parents* may remain, and the translation would with correctness and propriety read thus, "his parents and next of kin." So much for the mere literal translation; now to the application of the sense in either case. The learned commissioners, trusting to the "decisions founded on those statutes" rather than to their own learning and the evidence of their own senses, observe in p. 34, that in framing a new law, an exception should be made in favour of relations affording aid in maintaining suits, and descant upon the inhumanity of denying such aid; and declare the exception could not be restrained even within these limits. They therefore have overlooked this last clause of the 28 Ed. 1, c. 11, entirely,

or, in imitation of "my wise masters learned in the law," have trusted to the very defective translation only. The commissioners show that much inconsistency exists in the decisions they have cited, and to obviate this they say their new proposed law ought to allow "next of kin" to assist in suits. But the law has and does allow such assistance, as is clearly seen in the French text of the chapter under consideration. I am bold to affirm, and without fear of contradiction, that this chapter treats of nothing else than champerty, from its first to its last clause. The word "fee" in the last line but one of the English version has no counterpart in the French; no word in the French text can warrant the use of the word *fee* in the translation.

Now I offer the following as a more correct translation of the last clause, namely:—But in this case it is not to be understood that a man may not have counsel of pleaders and learned men for the giving of *his own* or of his relations or his next of kin.—This being admitted as the true meaning of the clause, can it be said that this law prohibited any one from giving a part of *his own* estate in payment of a legal process for its recovery. But it will be presently seen that these

statutes never contemplated the giving of a *part* of an estate in support of a law process.

If, therefore, my version be correct, the supposed injustice and inhumanity of the law of champerty, as far as this particular chapter is concerned, disappears on a proper consideration of the true meaning of the original Norman-french, and is to be attributed to the "literal translation." The translation which I have given of this last clause in the chapter, I offer with much deference, but I am quite indifferent as to its admission or condemnation; for admitting my translation and my inferences to be in error, that error does not in any way lessen the clear proofs now given in support of the assertion that these "mere literal translations" are not only not literal, but in fact and in effect false translations. This vastly erroneous translation has given rise to arguments as well as to decisions equally erroneous. The introduction of the word "fee" may have suggested the idea that this last clause related in reality to maintenance, whilst the clearly printed word *champart* in the French must have proved to all capable of reading, that champerty was the object of the whole chapter. And there cannot be the slightest

pretence for translating the word, "*soen*" [1] by the word "fee," the same word having been correctly translated in the former part of the statute. "*Soen droit*" is translated "his right," that is, *his own* right. Let any one read the French text carefully, and he must clearly perceive the grand mistake of Barrington, and of all others who have entertained the same opinion, whether before or subsequent to his day. And it is no defence to say, that, as champerty is a means or species of maintenance, so this chapter treats of both offences; we cannot say that as every act of champerty is an act of maintenance, so reciprocally every maintenance is an act of champerty.

The translation of the 33 Ed. 1, st. 3, is just as defective and as far from literal as the other chapter herein more particularly noticed; and so is the translation of 13 Ed. 1, st. 1, c. 49. I will not now go into a full consideration of the causes which called forth all these statutes, but where I to do so, I should be far from assigning the corruption of judges as any one of those causes. Let the reader consider the state of the country at the

[1] This word *soen* was, perhaps, originally written *sien* in the last clause, and *son* in the first clause in which it appears in this 11th chapter.

time, and that instead of peaceable conveyances on parchments, it was the keen edge of the murderous sword that constituted the chief title to an estate in possession in those days. All England had been but recently carved out by the sword of William of Normandy, and distributed to his vassals; and in the subsequent reigns down to Ed. 3, many estates had been again repossessed by the crown, or the lord, who had attained to them either by the process called *atteindre*, or *attaindre*, upon very debateable grounds, or by the more horrible doings of private and domestic wars. These statutes were in reality a part of a certain system which the early Norman dynasty of feudal times found necessary to set up, and that later dynasties have found convenient to maintain, though now applied to purposes foreign to the design of the original statutes.

The meaning given by our lawyers to the word *champerty* is not less erroneous than their definition of the word barretry, and presents another "singular deviation from an original use." It is remarkable, that a man of such learning and research as Blackstone, when alluding to the French law of *champart*, should have confined his relation apparently to the modern law, totally neg-

lecting any reference to the use and history of champerty in feudal times; and even for what he has said of it he has given no authority.[1] Indeed, his account is difficult to understand, because, when he wrote, the new law had not been passed in France, and the seigneurial rights of champerty had not been abolished.[2] Now, before the new form of government, and system of law adopted by the French in 1793, two kinds of champerty existed; the one *feudal*, riding over an estate, and the exclusive property of the lord; the other, that which may be termed a rent paid for the use of the lands, &c.[3] both, however, being, according to Blackstone, "a part of the crop annually due to the landlord by *bargain* or *custom*." But it was not a similar division of profits or of land, nor "a maintenance of a lawsuit for the recovery of an estate, by a bargain to give *a part* of the land or thing in dispute for the recovery of the whole." Champerty was originally, and now remains in fact a feudal right, not consisting of any right to the possession of any part of the estate or of any *rent* for the use of it;

[1] Com. Bk. 4, p. 135.

[2] They were abolished in July, 1793. See Carré's work on "*le juridiction des justices de paix*," before cited, tom. 2, p. 371.

[3] L'un *seigneurial*, l'autre *purement foncier*. Ibid. p. 371.

but in reality the right of the lord to a certain number of sheaves of corn, or bundles of straw (*gerbes*),[1] in the harvest of the tenants upon his seigneurial estate. And generally the lord's right to participate in such and such proportions with the proprietor in the produce of the inheritance. Now all our first laws with respect to champerty were passed in the feudal time of Ed. 1, and there cannot be a reasonable doubt that it was by no means an uncommon practice for great men to say, "Give me the champerty and you may hold the estate," or, "gain me that estate and I will grant you the champerty, or permit you to retain it as a compensation for the trouble and the costs of obtaining the estate by process of law." Hence it is not difficult to suppose, that the lawyers of that olden time, like *some* lawyers of modern days who buy manorial estates, took occasion to make the most of the *champerty*, and obtained all they could possibly exact in kind, or by fees, or by compensations, or fines in money, "whereby all the realm is much grieved, and both rich and poor are troubled in divers manners."[2]

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[1] See the word *champart*, in Roquefort's Gloss. de la langue Romane.

[2] Stat. 3 of 33 Ed. 1.

But if we reason upon these statutes of champerty with a knowledge of the true meaning and nature of the ancient feudal right of *champart*, notwithstanding some of them have extended the *principle* of *champart* to other things at issue, we shall easily discover the cause of the severe enactments against those who might dare to carry on a suit at law for no other reward than the *right* of champerty. Is it impossible to entertain an idea of the great and galling inconvenience that a feudal lord must necessarily experience when, on coming into the possession of his patrimonial estates, he finds a commoner in the actual enjoyment of the great feudal right of champerty over the whole property? And was that inconvenience likely to be more easily borne when the mighty lord reflected, that this commoner gained possession of the valuable right by means of the simple advantage of being enabled to read, so as to conduct a cause in a court of law; when the lord himself and his whole order were indebted to the powerful arm of the law to enable them to escape the punishment justly due to their crimes by granting them the "benefit of clergy, although they *cannot read*."

Nothing could, therefore, be more derogatory

to the petty sovereignty of an old feudal tyrant than the loss of his champerty, and nothing more provoking than to see this right in the hands of a low Saxon commoner. In these several laws, as well against champerty as the law of the benefit of clergy, granted to those who *cannot read*, we see a vain attempt to arm ignorance against its own weakness, and to take from knowledge its all-commanding power.[1] Bacon originated the unerring maxim, that "knowledge is power," and the historical relations of the past, and the experience of present times, destine the apophthegm to be for ever received as a sacred truth.

Had the original meaning of the term champerty been retained, all that confusion, hardship, contradiction and injustice, pointed out by the learned commissioners, would never have taken place, and the nation would have been spared the disgrace it has consequently suffered.

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[1] The implacable and mutual hatred between the Norman feudal lords and the Saxon, or English denizen, is forcibly depicted by Thierry in his Histoire de la conquête de l'Angleterre par les Normands; towards the close of the second volume, pp. 306-7 more particularly.

This bad feeling, so natural to the then state of the country, embittered all the relations of life, even for some centuries after the conquest.

SECT. 2.

SOME OBSERVATIONS ON THE FOLLOWING NOTE—AT THE FOOT OF PAGE 33 OF THE FIFTH REPORT OF THE COMMISSIONERS ON CRIMINAL LAW—ON THE WORD "BARRETRY;" AND, ON CERTAIN ANCIENT STATUTES TOUCHING THIS OFFENCE:—

"The present use of the term Barretry constitutes a singular [1] deviation from its original sense. Mr. Hume (Commentaries on the Law of Scotland respecting Crimes, vol. 1, p. 587, 3d edit.) observes, that 'Barratry, in the law of England, is the offence of stirring up suits and quarrels among His Majesty's subjects. The term is, however, of foreign origin, and seems ordinarily to have been applied, in Italy and other countries, to the traffic of ecclesiastical benefices, but was afterwards used in a more general sense as applicable to all corrupt buying and selling of justice. With us it signifies the corrupt purchasing of benefices, or offices of collection, from the see

[1] For "singular," the commissioners might with greater propriety have said—"one of the numerous instances of the perversion of the original sense of words by law writers."

of Rome, by persons who left the realm for that purpose; a practice which had become frequent, and was, in more ways than one, injurious to the realm.'"

The commissioners have thus given Lord Coke's definition of the offence of Barretry: "A Barretor is a common mover and exciter, or *maintainer of suits, quarrels,* or parts, either in courts or elsewhere in the country. In *courts,* as in courts of record or not of record; as in the county, hundred, or other inferior courts. In the *country,* in three manners: First, In disturbance of the peace. Secondly, In taking or keeping of possession of lands in controversy, not only by force, but also by subtlety and a deceit, and most commonly in suppression of truth and right. Thirdly, By false inventions and sowing calumniations, rumours, and reports, whereby discord and disquiet may grow between neighbours." (1. Inst. 368. a.) [1]

[1] Fifth Report, p. 33. For the first part of this splendid piece of legislation on the part of Lord Coke, there is no other authority than an erroneous translation of an old statute, and for the rest of this definition the world is indebted to the high legislative functions which our judges, during some centuries, have most unconstitutionally exercised.

Nothing would be more interesting than to be informed, why the learned commissioners did not venture to give us the original sense of the word "Barretry?" And why they were content to give us Lord Coke's definition, and there sticking fast, without any reference to former times? I think I possess the means of answering very satisfactorily for the commissioners, and also most probably very nearly in their own terms. But I will quit speculation for matter of fact, and make an effort to supply the great deficiency by a little investigation.

Let the reader consult the Della Crusca Dictionary of the Italian Language, (edit. 1819); and he will find the root of this word "Barretry" in the verb Barare or Barrare: and the verb Barratare, and the substantives Barattatore and Baratteria will explain the true meaning of barretry. He will then discover that Barretry is used in two senses; first, and entirely as *barter* or dealing; and secondly, and most commonly, as a deceit of any kind, and *cheating*, or trading and dealing connected with cheatery. And generally, in the ancient classic writers of Italy, the word is used in its bad sense; that is, as a

term of reproach, and indicative of the low and vile character of one called a Barattore, or "Barattor" or "Baretor," or "Barretor."

Now, those who consider the Italian to be derived from, or a corruption of, the Latin tongue, will judge the root of these words to be in the word "Balatro," meaning a vile fellow or rogue; the *l* in this word being interchangeable with the *r* of the Italians and the English. And again, the Latin word, as well as the Italian, may perhaps be traced to the Greek word Βαραθρον, as given in the Della Crusca dictionary.[1]

It will be found also, that, in the ancient romances of the French, every form of the word Barretor is used as some derivative of the radical verb *to cheat*, or deceive; as the following extract from the Roman de la Rose will prove:—

"Car les dures villes chenues,
Quant de jonesse sont venues,
Où jadis ont estés flatées
Et surprises et *baratées*,
Quant plus ont esté deçéues
Plus tost se sont apparçéues,
Des *barateresses* flaveles,
Que ne font les tendres puceles,

[1] In the dictionary of the Spanish academy, the root of this word is traced to the Hebrew word *Barath*, or to the Arabic word *Baraton*.

Qui des aguez point ne se dotent,
Quant les fleuteors escotent.
Ainz cuident que *larat* et guile
Soit ausinc voir com Evangile." [1]

In the Spanish language, also, the same meanings are given to the same forms or derivatives of this word *Barretry*. And we may infer that, in ancient days, over the whole continent of Europe, south of the Rhine, and in England, the terms to deal, and to cheat, were very nearly synonymous. In all writers, save english lawyers, the original meaning of the term Barretor has been preserved from the earliest period of the revival of literature to the present day.

And no form or derivative of the word Barare is to be found in the German language, from which I infer the Saxons knew it not.

But the commissioners may say, "We did not require any one to tell us all this." Let us, therefore, now view the term Barretry, or Barretor, more closely in connection with our own laws. And thus we shall consider its use amongst legislators at a period somewhat anterior to the high classic age of Italy, namely, in the 13th century.

With respect, however, to Mr. Hume's account

[1] See Roquefort's Gloss. de la langue Romane, art. Barateur.

of the term Barratry, it is clear that the term is used in its bad sense, or as indicating fraud, but limited to a particular kind of dealing in the church contrary to law. And the term is so far used correctly both by Italian and Scottish jurists: not so, however, by my Lord Coke.

We will now quit, for a moment, our foreign researches, and inquire nearer home, and thus a new light will be thrown upon our "reverend sages in the law."

Take the first vol. of the Statutes at large, by Ruffhead, and it will be found that the first statute in which the term Barretor is used, is the 3 Ed. 1, c. 18. And as the whole passage is short, I will give it here both in the French and the English version.

"Pur ceo qe la commune fine et amerciement, de toute le countee en Eire des Justices per faux jugementz, ou per autre trespas, est assis per Viscountes et Barettours des countees malement, issint qe la somme est meiutfoitz encru, et les parcelles autrement assis qestre ne deussent, al damage del poeple, et plusours foitz sont paiez a Viscountes Barettours, qe point ne les acquitent, purveu est, et voet le roi, &c."

The English is as follows:—

"Forasmuch as the common fine and amerciament of the whole county in Eyre of the Justices for false judgments, or for other trespass, is unjustly assessed by Sheriffs and BARETORS, in the shires, so that the sum is many times increased, and the parcels otherwise assessed than they ought to be, to the damage of the people, which be many times paid to the Sheriffs [and] Baretors, which do not acquit the payers; it is provided and the king wills, &c."[1]

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[1] Those who may consider the word *Barettours* as an adjective or epithet to the word *Viscountes*, must still use the term in its reproachful sense, by reason of the context; for the word *and* in brackets in the latter part of the English translation is not in the original French text, and therefore the term Barettours may be taken adjectively to the word Viscountes, meaning thereby *Fraudulent Sheriffs*; and the word "*et*," or "*&*," most probably should not have been in the French text in the fourth line. The following extract from note (A) on the 18th canto of Dante's Inferno, by J. C. Tarver, (Lond. 8vo. 1824, tom. 2nd), is singularly illustrative of the term "barretry;" thus he says, "Dans le cinquième fossé, sur le pont duquel les Poètes sont arrivés, se trouvent renfermés tous ceux qui, placés dans un *emploi quelconque*, ont *trahi* la confiance de leurs chefs et de leurs administrés; soit en agissant contre les principes de la justice, soit en faisant servir à leur avantage particulier un pouvoir, qui ne leur avait été confié que pour le bien général. Les Italiens désignent cette espèce *de trafic* sous le nom de *Baratteria*. La *Baratteria* est aux *emplois public*, cé que la Simonie est aux emplois ecclésiastiques." I must now add the next very short sentence—"Dante pensait, à ce qu'il paraît, que le premier de ces crimes est plus grand que le dernier, puisqu'il met ceux qui en ont été coupables plus près du centre de l'Enfer."—Thus it is clearly seen that Dante wrote in the spirit of the times, and the

Can any thing be more clear than that the term Barretor is used in its most common, original, and significant sense, as a vile cheating character? that is, used and clearly explained in the sense of a cheat. And by Mr. Hume the term is used also to signify a corrupt traffic in the office of collection, &c. giving a more correct and original use of the term. And this statute of 3 Ed. 1, c. 18, points out to us the character of these Barretors, or Barretor Sheriffs, the collectors by distress upon the goods of those owing fines, mere rascals, who collected the fines and gave no receipt, or acquittance, for the money. And if we call to mind the unceremonious manner in which the sheriffs collected the dues of any district, the Barretors, whether sheriffs or their agents, must have inflicted a vast mass of misery upon every one who fell into their rapacious hands.[1]

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contempt in which Barretors were held, that is, fraudulent persons were held in those days, is illustrated equally by the poet, and the statutes of Ed. 1 and Ed. 3 of England. For the reader will recollect that no Barretor was to be a keeper of the peace, or to form part of those commissions to which writs of "*oyer* and *determiner*" were to be issued for the trial of offences. In the explanation of the word βαραθρος as given in the Handworterbuch der Griechischen Sprache von Franz Passow, the reader will find a singular coincidence of ideas with those of Dante.

[1] "Par l'ancienne loi, quand un district (*hundred*) devait une

From this statute it is therefore clear, that our lawyers had the authority of the ancient laws of the realm, for maintaining the pure and original meaning of the term Barretry. Why was it departed from by them? and what led the way to the present false use of the word? Now, if we consult the next statute in which this word appears, a clue will be given us towards a solution of the second question; but as to the first question, I begin to think it is of too delicate a nature to be answered at all, at least in this place.

The 3 Ed. 1, c. 33, begins in these words :—

"Purveu est, qe nul Viscont ne souffre Barettour *maintener paroles* en countees, ne seneschalx," &c.

In the English version, thus strangely and falsely translated :—

"It is provided, That no Sheriff shall suffer

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somme d'argent, le sherif se saisissait du premier habitant de ce district qui lui tombait sous la main, et le faisait payer tous les autres," &c.—Bentham's Théorie des Peines et des Récompenses. Par Et. Dumont. Vol. 1, p. 150, note. Paris, 1825.

And in addition to this observation, the 33 Ed. 1, stat. 1, c. 36, will show that sheriffs, as well as others, could bring *false suits* for the purpose of levying fines at their pleasure upon whom they would. These were the "Viscountes Barettours."

any Barretors *or Maintainers of Quarrels*[1] in their shires, neither stewards," &c.

What can be said of such a "literal translation" as this; does it mean that Barretors are maintainers of quarrels, or are the words "maintainers of quarrels" to be put out of consideration? In either case the meaning of the original could not be expressed. Now, the word "paroles" is somewhat more correctly translated in the 3 Ed. 1, c. 25, by the English word "suits."[2] We see, therefore, that a better translation would run thus: "That no Sheriff shall suffer any Barretors to maintain suits in the counties." Truly, this is not to be taken as a correct translation, as will be shown presently; but it is merely given for the moment, by way of keeping to the original style of the "*literal* translations" in our statute book.

If the whole chapter be considered, it will be found that its object is to prevent even the respectable seneschals of the lords to "make" suits, unless appointed as attorney, and that Barretors are absolutely excluded. I could easily

[1] The words "maintainers of quarrels," will recall to the reader's mind Lord Coke's definition of a Barretor; *supra*, p. 193.

[2] A forced construction, nevertheless.

illustrate the true force and object of this chapter, but I should be accused of indulging in mere speculative opinions. I therefore pass on to the object which I had in view in bringing this 3 Ed. I, c. 33, to the notice of the reader.

Before we quit this chapter, it is of importance to take a note of the title, placed at the head of it; viz. "No maintainers of quarrels shall be suffered:" now these words being conformable to the text in the English version, and that version being obviously wrong, it follows that the title is wrong also; and I have not the smallest doubt but that it owes its original to some *great man*, who could not read the statute in its original French. Bad as is this title, it has the authority of the English text; but there are a great number of titles to chapters of statutes that are equally bad and false; yet these have not the pretext of any authority in the wording, either of the original French, or the English translation. And I illustrate the fact by the statutes in the reign of Ed. 3, relative to the keepers of the peace, falsely styled in the titles "Justices of the Peace," up to the 34th of that reign.[1] And in every statute, from

[1] The first of these statutes is the 1 Ed. 3, stat. 2, c. 16; the French text is very erroneously translated; thus, "meyntenours

the 3 Ed. 1, c. 18, in which the word "Barettour" occurs, including those of Ed. 3, here alluded to, there is not anything in the context that can warrant any other than the old general and customary meaning of the term Barretor, or Barretry, either as a dealer or a cheat. As, therefore, it is well known that by all authors, not English lawyers, whether in Italy, France, or Spain, this correct signification of these terms has been preserved from the days of Dante, and of Ed. 1, (1290), to the present time,—there is not a doubt but *the legal and false* meaning of the word Barretry owes its origin to the erroneous translations, and equally erroneous titles, of the statutes.[1]

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de malveis Baretz," is translated by "maintainers of evil, or Barretors:" indeed, the whole translation of this little chapter, of only four lines of French text, is one mass of error.—See also the 34 Ed. 3, c. 1, line 6, wherein the spelling of the word *barottours* leads to great confusion; for if the first *o* is to be taken for an *a*, in order to uphold the English word given for it, why may not the second *o* be changed into an *e*, to make it an equally correct word, meaning carmen or cart-drivers. No laws in the world can show more debateable ground than these old statutes.

The word "Barettez," in the 33 Ed. 1, stat. 2, is translated "Debates;" and there is nothing in the French text to warrant the use of the word "quarrels" in the English. Thus, whether the statutes relative to Justices of the Peace, or to maintenance, or to champerty, or to barretry be inquired into and examined, there is found the same defective condition of these "literal" translations.

[1] As to the use of this word in Spain, let us not forget our old

Errors pronounced by some very great man, of such exceeding great authority, that all lawyers, little and big, have, according to a custom unfortunately not peculiar to their order, adopted them, followed the pernicious example, and perpetuated these mistakes, till at length some exclaim, "Behold, in the use of the term Barretry, a singular deviation from its original sense!"

Could I afford the time for the necessary investigation, I doubt not but that the adoption of the mistake would first appear in the work of some "reverend sage learned in the law," between the days of Fitzherbert and Lord Coke.

As to Lord Coke's definition of the term "Barretry," he probably took the meaning from some one of his predecessors, and amplified upon the subject with his usual prolixity. At all events, he has secured to himself the merit of adopting the mistake so obvious in the translation and title

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acquaintance, Sancho Panza, as governor of *Barataria;* and the following brief sentence from Cervantes will admirably illustrate the uses of this word and some derivatives of the original root. "Diéronle á entender, que se llamaba la insula Barataria, ó yo porque el lugar se llamaba Baratario, ó yo por el Barato con que se le habia dado el Gobierno." See la vida del gran Tacaño, by Quevedo, for the best practical illustration of barretry in all its forms of practice.

of the 3 Ed. 1, c. 33, if indeed he be not the original promulgator of the error.

It was the peculiar manner, amounting perhaps to a *ruse*, in which the learned commissioners, in their 5th Report, referred to the altered sense of the word "Barretry," that excited my attention. With a true professional tact they call the false meaning "a singular deviation from its original sense;" whereas it must have been obvious to any one acquainted with the general character of the 1st vol. of our Statute Book, and with the general character of Lord Coke's definitions and derivations of words,[1] that this "deviation" was more likely to be a grave mistake, an

[1] The commissioners have most discreetly omitted Lord Coke's derivation of the word "Barretor:" it will be very instructive, however, to have it before our eyes, and I extract it from the 11th edit. of his 1st Inst. as follows: "Barretor is derived from this word (*Barret*), which signifieth not only a *wrangling suit*, but also such *brawls* and *quarrels* in the country, as aforesaid:" this *aforesaid* meaning the definition before quoted at the head of this paper. Nothing is more clear from this affected derivation, than that Lord Coke knew nothing of the matter. But J. Bentham has truly said, upon speaking of Coke's derivation of the term *felony*—"Sir E. Coke qui ne savait pas le grec, mais qui savait *un peu* de Latin, et qui ne perd aucune occasion de l'étaler, fait venir ce mot de *fel*, le fiel. Il aurait pu avec autant de probabilité le faire venir de *felis*, le chat animal infidèle et fripon."—(See Théoric des Peines et des Récompenses de J. Bentham. Par Et. Dumont. 8vo. tom. 1, p. 421. 3me edit. Paris et Leipzig.)

uncompromising perversion of the term, than a well studied, well understood, and correct explanation of its sense: and so it turns out to be.

Had the "deviation" from the original use of the term been of the like nature to that attendant upon the present general use of many antique words, such as the altered signification of the word "villain," no notice would have been taken of it; but the commissioners' note seemed like a gracious slurring over of a gross and palpable mistake of some one, the glory of whose vast learning was to be maintained at any cost and price. This system of screening the faults on the one hand, like the frequent magnifying of the excellencies on the other hand, of certain great men, has been carried on through three centuries, and at length arrived at that height as to become absurd and contemptible; and Butler's preface to the 13th edition of "Coke upon Littleton," has outdone all his predecessors, and absolutely given to Lord Coke the attributes of a deity.

And now, having made these remarks, I cannot conclude this paper without suggesting a more correct version of the French text on the 3 Ed. 1, c. 33.

And this brings on the consideration of the phrase "maintener paroles;" this certainly is an old French phrase, and is synonymous with "tenir à paroles," and both mean "*to discourse,*" and therefore in this statute means "to plead." Thus the true wording should run—"that no sheriff shall suffer any Barretors to plead in the counties." The pleading here designated alludes to pleading at the bar: a reference to the 25th cap. of this statute bears me out in this opinion, since pleas, and pleading at bar, are distinctly noticed; thus, "Nulle ministre le Roi ne maintene per lui, ne per autre, les *plees, paroles,* ou busoignes, qe sont en la cour le Roi," &c.[1] But, if I am rightly informed, this illfated word, Barretry, now asserts its right and resumes its original sense in *marine* policies of the present day.

And no laws, say the commissioners, are *now* wanted to correct Barretry! no laws to secure "the integrity and character of the bar!" Be it so, but I suspect the commissioners estimate all

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[1] The title given to this 25th chap. is in the usual style of broad assertion, "None shall commit *champerty,* to have part of the thing in question." This assumes a fact not mentioned in the act; and though the chapter contains but six lines, it is also incorrectly translated.

men by the purity of their own intentions.—Yet, if man has not suffered "a singular deviation" from his original nature, the following lines from Dante will yet apply—

"Ogni uom v'è *barattier*, fuor che Buonturo:
Del no, per li denar, vi si fa ita."

Dell' Inferno, cant. xxi., v. 41, 42.

THE END.

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